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Supreme Court, U.S.
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# In The
# Supreme Court of the United States
## October Term, 1994

JOHNSON CONTROLS, INCORPORATED, SYSTEMS & SERVICES DIVISION, and PNEUMATIC CONTROL SYSTEMS COUNCIL,
*Petitioners,*

*v.*

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, and ITS LOCAL 353,
*Respondents.*

**On Petition For A Writ of Certiorari**
**To The United States Court of Appeals**
**For the Seventh Circuit**

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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## IN THE
## UNITED STATES COURT OF APPEALS
## FOR THE SEVENTH CIRCUIT

No. 94-1278

JOHNSON CONTROLS, INCORPORATED,
SYSTEMS & SERVICES DIVISION, and
PNEUMATIC CONTROL SYSTEMS COUNCIL,

*Plaintiffs-Appellees,*

v.

UNITED ASSOCIATION OF JOURNEYMEN AND
APPRENTICES OF THE PLUMBING AND PIPE
FITTING INDUSTRY OF THE UNITED STATES
AND CANADA, AFL-CIO, and Its LOCAL 353,

*Defendants-Appellants.*

Appeal from the United States
District Court for the Central District
of Illinois, Peoria Division
No. 93 C 1123 - Michael M. Mihm, *Chief Judge*

Argued September 14, 1994
Decided November 15, 1994

JUDGES: Before LAY,[*] EASTERBROOK and RIPPLE, *Circuit Judges.*

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[*] The Honorable Donald P. Lay, Circuit Judge for the United States Court of Appeals for the Eighth Circuit, sitting by designation.

LAY, *Circuit Judge*. Johnson Controls, Inc. and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry ("the Union") dispute whether Johnson's assignment of certain preventive maintenance work to nonbargaining unit employees violates their collective bargaining agreement. On September 26, 1989, the Union initiated a grievance against Johnson alleging that Johnson was using nonbargaining unit personnel to perform maintenance work on mechanical equipment. The grievance could not be resolved and the dispute was submitted to arbitration. The arbitrator found in favor of the Union, concluding the agreement covered the maintenance work. The district court vacated the arbitrator's award and granted summary judgment in favor of Johnson, concluding the arbitrator went beyond the terms of the agreement. The Union now appeals. Jurisdiction is vested in this Court pursuant to 28 U.S.C. § 1291. For the reasons set forth below, we reverse.

*Background*

Johnson Controls, Inc. is a member of the Pneumatic Control Systems Council ("the PCSC"). The PCSC is responsible for negotiating bargaining agreements with the Union on behalf of its members. The Union is a qualified labor organization under 29 U.S.C. §§ 152(5) and 185(a), and represents employees of PCSC members for purposes of collective bargaining. The Union's Local 353 represents various employees at Johnson's Peoria location. The Union and PCSC entered into the National Pneumatic Control Systems Agreement ("the Agreement"), at issue in this case, on March 31, 1989.

The Agreement mandates arbitration for certain grievances arising between the signing parties. Paragraph 53 of the Agreement defines the scope of the arbitrator's authority as follows:

> The authority of the . . . impartial arbitrator shall be limited to the construction and enforcement of the express language of this Agreement as applied to the specific grievance or issue stated in the request for arbitration. The . . . impartial arbitrator shall have no authority or jurisdiction, directly or indirectly, to add to, subtract from, change, modify or supplement any of the specific provisions of this Agreement.

In July, 1989, a different local chapter of the Union filed a grievance in St. Louis against Johnson for the assignment of some preventive maintenance work to nonbargaining unit employees in breach of a provision of Paragraph 13(1) of the Agreement. Paragraph 13(1) provides in pertinent part:

> This Agreement covers the rates of pay, hours and working conditions of journeymen and apprentices engaged in the installation, service, and *maintenance of all plumbing and/or pipe fitting systems, including pneumatic controls and mechanical equipment* and component parts . . . .

(emphasis added). In October 1990, the arbitrator in that dispute found that the parties could not "agree on what was decided between them" as to whether these workers were covered by Paragraph 13(1). The first arbitrator concluded that

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### *Background*

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(emphasis added). In October 1990, the arbitrator in that dispute found that the parties could not "agree on what was decided between them" as to whether these workers were covered by Paragraph 13(1). The first arbitrator concluded that

Paragraph 13(1) did not cover preventive maintenance work and therefore held for Johnson.[1]

On September 26, 1989, Local 353 filed this grievance against Johnson advancing the same claim; namely, that Paragraph 13(1) provides for preventive maintenance work on mechanical equipment to be performed by collective bargaining personnel. After determining the St. Louis Arbitration did not preclude a determination on the merits, the arbitrator[2] issued an award for the Union, holding Paragraph 13(1) includes preventive maintenance work, and thus such work is reserved for bargaining personnel. The arbitrator drew this conclusion after undergoing a detailed analysis of the relationship and bargaining history of the parties. Johnson filed suit in district court to vacate the arbitrator's award.

The District Court for the Central District of Illinois[3] vacated the arbitrator's award and granted summary judgment for Johnson. Although the court did not question the arbitrator's factual findings, it took issue with the arbitrator's reasoning. In discussing why he reached the opposite result of the St. Louis proceeding, the arbitrator stated:

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[1] The Union filed suit to have this decision vacated. The District Court for the Eastern District of Missouri refused to vacate this decision, and granted summary judgment in favor of Johnson.

[2] Arbitrator George Edward Larney.

[3] The Honorable Michael M. Mihm, Chief Judge.

> [T]here was a recognition by the [PCSC] and the Union that a resolution of the issue had not necessarily been resolved, that it had been fudged for whatever their respective reasons and that there was almost an understanding that the matter would have to be disposed of in arbitration as evidenced by the remark made by Tarkowski to Moore at the last bargaining session that if the Union felt the new paragraph [13(1)] covered the work of [preventive maintenance inspectors], the Union could file a grievance. Based on this remark and the uncertainty as to the meaning of what had been agreed to, the Arbitrator is of the view that the instant case, like the St. Louis case before Erbs, represents an exception to the "maxim" [that a party should be barred from securing through arbitration what it was unable to secure through negotiations].

The court interpreted this statement to mean that the arbitrator had found no "meeting of the minds" between the parties with regard to the meaning of Paragraph 13(1). The court went on to conclude that because the parties reached no agreement, further arbitration on this issue was beyond the arbitrator's authority. Thus, the court vacated the arbitrator's award because he had drawn his interpretation of Paragraph 13(1) from outside the Agreement. The Union now appeals the court's grant of summary judgment, and its denial of the Union's counterclaim for enforcement of the arbitration award, attorneys' fees, and prejudgment interest.

548 F.2d 1288, 1294 (7th Cir.) (quoting *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1128 (3d Cir. 1969)), *cert. denied*, 431 U.S. 905 (1977). Moreover, the Agreement's arbitration clause provides for this type of contract construction.[4] Thus, the thrust of the arbitrator's analysis falls squarely within his authority to interpret the contract. *See Enterprise Wheel*, 363 U.S. at 599 (stating a court has no business second-guessing an arbitrator's construction of the collective bargaining agreement); *Colfax Envelope Corp. v. Local No. 458-3M, Chicago Graphic Communications Int'l Union*, 20 F.3d 750, 754 (7th Cir. 1994) (indicating arbitrators are meant to resolve questions of interpretation when the meaning of a contract term is unclear).

The possible inconsistency of one paragraph of the arbitrator's opinion does not justify vacating the arbitrator's award. As we stated in *Ethyl, supra*, "It is only when the arbitrator *must* have based his award on some body of thought, or feeling, or policy, or law that is outside the contract . . . that the award can be said not to 'draw its essence from the collective bargaining agreement . . . .'" 768 F.2d at 185 (quoting *Enterprise Wheel*, 363 U.S. at 597) (citations omitted) (emphasis in original). The arbitrator's opinion is dominated by a discussion of the meaning of express language of Paragraph 13(1). In addition, the Supreme Court has stressed that a "mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award." *Enterprise Wheel*, 363 U.S. at 598; *see also Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1506 (7th Cir. 1991) (stating arbitrators' opinions need not be well written and should not be subjected to "beady-eyed scrutiny"). Thus, any confusion the arbitrator may have caused is insufficient to support the lower court's decision.

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[4] The clause limits the arbitrator's authority to "construction and enforcement of the express language" of the Agreement. The arbitrator's analysis of the bargaining history of the parties to discern the meaning of the express language of Paragraph 13(1) falls squarely within this clause.

We also reject the district court's conclusion that because the arbitrator found the parties came to no "meeting of the minds" concerning the scope of Paragraph 13(1), further arbitration on this issue was beyond his authority.[5] Assuming *arguendo* that the arbitrator actually concluded the parties reached no "meeting of the minds" on the meaning of Paragraph 13(1), such a finding does not prohibit the arbitrator from interpreting the provision. In *Colfax Envelope, supra*, we declared that contracting parties' disparate understandings of a particular provision of a collective bargaining agreement do not render the provision nonarbitrable. 20 F.3d at 754. We stated, "It is common for contracting parties to agree--that is, to *signify* agreement--to a term to which each party attaches a different meaning. It is just a gamble on a favorable interpretation by the authorized tribunal should a dispute arise." *Id.* (emphasis in original). We further clarified this principle: "When parties agree to a patently ambiguous term, they submit to have any dispute over it resolved by interpretation. That is what courts and arbitrators are *for* in contract cases--to resolve interpretive questions founded on ambiguity." *Id.* (emphasis in original). Only if the contract provision contains a "latent ambiguity," or, in other words, is the result of a mutual misunderstanding, is it subject to rescission and outside the arbitrator's interpretive authority. *Id.* Because Paragraph 13(1) clearly is not the product of a mutual misunderstanding between PCSC and the Union, the district court's "meeting of the minds" analysis was erroneous.

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[5] Our analysis is in agreement with the Union's argument that neither the first arbitrator nor Arbitrator Larney's opinion found there was no agreement. Neither party ever submitted this argument at either arbitration proceeding.

Thus, we hold the district court improperly upset the arbitrator's award. We therefore reverse with directions to enforce the award.

## II.

The Union also argues the district court erred in denying its request for attorneys' fees and costs. Although we find in favor of the Union, this case presents at least a colorable question of law. We cannot conclude, therefore, that Johnson's arguments before the district court and on appeal were frivolous or in bad faith. Thus, we agree with the district court's denial of an award of fees and costs. *See, e.g., Chicago Newspaper Publishing Ass'n v. Chicago Web Printing Pressmen's Union No.* 7, 821 F.2d 390, 398 (7th Cir. 1987) (stating that while the court disagreed with the employer's argument, it would not award fees to the union because the employer did not exhibit bad faith in challenging the arbitration award).

## III.

For the foregoing reasons, the district court's grant of summary judgment in favor of Johnson is reversed with directions to enforce the arbitration award. The district court's denial of the Union's request for attorneys' fees, however, is affirmed.

A true Copy:
Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

JOHNSON CONTROLS, INC. SYSTEMS )
& SERVICES DIVISION, and )
PNEUMATIC CONTROL SYSTEMS )
COUNCIL, )
)
Plaintiffs, )
)
v. ) Case No.
) 93-1123
UNITED ASSOCIATION OF )
JOURNEYMEN AND APPRENTICES OF ) (Final
THE PLUMBING AND PIPE FITTING ) Judgment
INDUSTRY OF THE UNITED STATES ) entered
AND CANADA, AFL-CIO, and Its ) 1/21/94)
LOCAL 353, )
)
Defendants. )

## ORDER

Pending before the Court is Plaintiffs Johnson Controls' and Pneumatic Control Systems' Motion for Summary Judgment [11] and Defendant United Association's Motion for Summary Judgment, Attorneys' Fees and Prejudgment Interest [14]. For the reasons set forth below, the Plaintiffs' Motion is granted, and the Defendants' Motion is denied.

## STATEMENT OF THE CASE

Plaintiff Johnson Controls, Inc. [Johnson] is one of several members of the Pneumatic Control Systems Council [PCSC]. PCSC exists to negotiate collective bargaining agreements on behalf of its constituent members with Defendant United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry [United Association]. United Association is a labor organization within the meaning of 29 U.S.C. §§ 152(5) and 185(a) representing employees for purposes of collective bargaining on behalf its members employed by members of PCSC. Defendant Local 353 is a local union of United Association that represents, for collective bargaining purposes, certain employees at Johnson Controls' Peoria, Illinois operation. United Association and PCSC entered into the National Pneumatic Control Systems Agreement [Agreement], effective March 31, 1989.

The Agreement provides for the arbitration of grievances arising between the parties thereto. Art. XVII, ¶ 51. Article XVII, Paragraph 53 provides that:

> [t]he authority of the Arbitration Board and of the impartial arbitrator shall be limited to the construction and enforcement of the express language of this Agreement as applied to the specific grievance or issue stated in the request for arbitration. The Arbitration Board and the impartial arbitrator shall have no authority, directly or indirectly, to add to, subtract from, change, modify, or supplement any of the specific provisions of this Agreement.

On July 6, 1989, Local 562 of United Association in St. Louis, Missouri, filed a grievance against Johnson for the assignment of certain preventative maintenance work to non-bargaining unit employees, in breach of Paragraph 13 of the Agreement. Article II, Trade and Work Jurisdiction, Paragraph 13, provides in pertinent part:

> (1) This Agreement covers the rates of pay, hours and working conditions of journeymen and apprentices engaged in the installation, service, and *maintenance of all plumbing and/or pipe fitting systems, including pneumatic controls and mechanical equipment* and component parts....

The grievance was heard by Arbitrator Thomas J. Erbs on June 5, 1990. On October 5, 1990, Arbitrator Erbs found that an agreement had not been reached by the parties on this issue and held that provisions not expressly stated in the contract should not be created by "implication or arbitral fiat." Therefore, Arbitrator Erbs found for Johnson. On December 28, 1990, United Association and the Local Union filed suit to vacate Arbitrator Erbs' award in district court. The District Court for the Eastern District of Missouri granted summary judgment for the defendants on August 18, 1992.

On September 26, 1989, Local 353 of the Union Association in Peoria, Illinois filed a grievance against Johnson advancing the same claim and violation of the same Agreement provision as the St. Louis grievance. The grievance turned on the issue of whether Paragraph 13(1) of the Agreement provided for preventative maintenance work on mechanical equipment to be performed by collective or non-collective bargaining unit personnel. On April 9, 1991, Arbitrator George Edward Larney held an arbitration hearing. On May 19, 1992, Arbitrator Larney, in an interim award, found that Arbitrator Erbs' 1990 decision did not preclude a determination on the merits of the Peoria grievance, and on February 3, 1993, in a

56 page written opinion, Arbitrator Larney issued an award for United Association and the Local Union on the merits. In that opinion, Arbitrator Larney held that Paragraph 13(1) of the Agreement included preventative maintenance work and that Johnson breached the Agreement by assigning preventative maintenance work to non-bargaining personnel.

On April 5, 1993, Johnson and PCSC filed this action pursuant to 29 U.S.C. § 185 to vacate Arbitrator Larney's award.

## MOTION FOR SUMMARY JUDGMENT

On a motion for summary judgment, the district court must determine "whether the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Colan v. Cutler-Hammer, Inc.*, 812 F.2d 357, 360 (7th Cir.) (per curiam), *cert. denied*, 484 U.S. 820, 108 S.Ct. 79 (1987), *quoted in Wolf v. City of Fitchburg*, 870 F.2d 1327, 1329 (7th Cir. 1989). The moving party has the burden of establishing the lack of such an issue.

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrates the absence of a genuine issue of material fact.

*Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986).

Once the movant has made a properly supported motion, the non-movant has the responsibility of going beyond the pleading and setting forth specific facts demonstrating the existence of a genuine issue of fact for trial. *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 567 (7th Cir. 1989); *Flip Side Productions, Inc. v. Jam Productions, Ltd.*, 843 F.2d 1024, 1031-32 (7th Cir.), *cert. denied*, 488 U.S. 909, 109 S.Ct. 261 (1988). *See Celotex*, 477 U.S. at 325. A material fact must be "outcome determinative under the governing law." *Shlay v. Montgomery*, 802 F.2d 918, 920 (7th Cir. 1986), *quoting Egger v. Phillips*, 710 F.2d 292, 296 (7th Cir.), *cert. denied*, 464 U.S. 918 (1983). The fact is genuinely disputed when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986), *quoted in Mays v. Chicago Sun-Times*, 865 F.2d 134, 136 (7th Cir.), *cert. denied sub nom. Platt v. U.S. Court of Appeals for the Seventh Circuit, et al.*, 493 U.S. 900, 110 S.Ct. 259 (1989). Thus, the non-movant must produce proper documentary evidence to support his contentions. *Howland v. Kilquist*, 833 F.2d 639, 642 (7th Cir. 1987).

## DISCUSSION

The scope of judicial review of arbitration awards is extremely narrow. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43, 108 S.Ct. 364, 373 (1987); *Ethyl Corp. v. United Steelworkers of America*, 768 F.2d 180, 183 (7th Cir. 1985), *cert. denied*, 475 U.S. 1010, 106 S.Ct. 1184 (1986). An arbitration award will be upheld so long as it "draws its essence from the collective bargaining agreement." *Ethyl*, 768 F.2d at 184, *quoting, United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 1361 (1960). This is true even where the court finds that the arbitrator misinterpreted the contract. *Ethyl*, 768 F.2d at 184.

The test of whether an award "draws its essence from" the underlying agreement is "whether the arbitrator had exceeded the powers delegated to him by the parties." *Ethyl*, 768 F.2d at 184. An arbitrator derives his authority exclusively from the parties as expressed through the agreement. Therefore, an arbitrator's authority is limited to the interpretation and application of the applicable collective bargaining agreement. *United Steelworkers*, 363 U.S. at 597, 80 S.Ct. at 1361; *Ethyl*, 768 F.2d at 185. If an arbitration award is found to be within the confines of the arbitrator's authority and based on an "honest decision" by the arbitrator, "after a full and fair hearing of the parties," the award will be upheld even if a court finds the award was based on an error of either fact or law. *Ethyl*, 768 F.2d at 183. In other words, if the court finds that the arbitrator interpreted the contract in making the award, the court's function is at an end. *Ethyl*, 768 F.2d at 187. Moreover, reasonable doubts on this determination must be resolved in favor of enforcing the award. *Ethyl*, 768 F.2d at 185. To set aside an arbitration award, the court must find that the award was not based on the contract.

Therefore, the only issue for this Court is whether Arbitrator Larney, in making the February 3, 1993 award, exceeded his jurisdiction to arbitrate this matter.

The issue before Arbitrator Larney was whether Paragraph 13(1) of the Agreement provided for preventative maintenance work on mechanical equipment to be performed by collective or non-collective bargaining unit personnel. Prior to this Agreement, the work at issue was performed by non-collective bargaining unit personnel. Whether the language modifications to Paragraph 13(1) of this Agreement actually changed the work jurisdiction at issue from that of the previous agreement necessarily required a determination on the intent of the parties to this Agreement. The parties to this litigation do not dispute that to determine the intent of the parties, Arbitrator Larney could consider extrinsic evidence.

Arbitrator Larney stated at pages 36 and 37 of his written opinion that:

> In his testimony in [the St. Louis arbitration], [Jim] Tarkowski [Manager for Human Resources at Johnson Controls and Chairman of the Council's bargaining committee] testified that when the Council agreed to drop its proposed Paragraph [13(2)], the list of tasks/duties it viewed as not work falling within the [United Association's] jurisdiction, and, at the same time, accepting the language of Paragraph [13(1)] as modified, he (Tarkowski) stated to [M. Eddie Moore, Chairman of United Association Negotiating Committee] more than one time that in accepting the language of [13(1)], *the member companies [of PCSC] would continue to operate as they had in the past, and that the Council was not agreeing the Paragraph [13(1)] covered work done by [preventative maintenance inspectors] or Tech Reps*. (Emphasis added).

Arbitrator Larney also stated that Tarkowski testified to stating during negotiations that, "if the Union felt the [modified paragraph] covered the [work of preventative maintenance instructors] the Union could file a grievance." Tarkowski also testified that Moore did not respond to this comment when it was made at the negotiations. According to Tarkowski, as restated by Arbitrator Larney, the Council's view was that the language modification of Paragraph 13(1) resulted in the Union completely giving up the right to perform preventative maintenance work.

In contrast to this, Arbitrator Larney's opinion also acknowledged Tarkowski's testimony that he knew the Union was emphatic about the language modifications to Paragraph 13(1) and that Moore's stated purpose for the language modifications was to increase the scope of United Association's work. Arbitrator Larney wrote, however, that Tarkowski testified that "he does not recall whether he responded to Moore by telling him it was the Council's view that by eliminating the 'incidental to' language [of Paragraph 13], the Union was decreasing the scope of its work jurisdiction."

This Court is unable to ascertain the chronology of the above testimony of Tarkowski as it relates to the negotiations process of the Agreement. The exact chronology would be probative on the issue of the intent of the parties with regard to their understanding of the substance of Paragraph 13. What is obvious from the above, however, is that the parties agreed to accept the language of Paragraph 13(1) as modified. On the other hand, what is not obvious is whether the parties agreed as to just what that language meant in terms of the Union's work jurisdiction or, as the Defendants argue, whether the parties agreed that the meaning of that Paragraph would be determined later by filing a grievance.

In any event, the decision of this Court turns on *Arbitrator Larney's determination as to the intent* of the parties. At page 55 of his written opinion, Larney stated that:

> there was a recognition by the Council and the Union that a resolution of the issue *had not necessarily been resolved*, that it had been fudged for whatever their respective reasons and

> that *there was almost an understanding that the matter would have to be disposed of in arbitration as evidenced by the remark made by Tarkowski to Moore* at the last bargaining session that if the Union felt the new paragraph [13(1)] covered the work of [preventative maintenance inspectors], the Union could file a grievance. (Emphasis added).

Arbitrator Larney wrote that "[b]ased on this remark and the uncertainty as to what had been agreed to, [he] is of the view that the instant case, like the St. Louis case ..., represents an exception to the 'maxim'" that a party should be barred from securing through arbitration what it was unable to secure through negotiations.

If the parties to this Agreement intended that the agreed upon language would be determined later by an arbitrator, the Agreement did not articulate that intent, and Arbitrator Larney's findings of fact, as quoted above, did not indicate as much. In fact, Arbitrator Larney, as the above quote states, concluded that an agreement on the meaning of Paragraph 13(1) had not been reached. Once Arbitrator Larney made the determination that there was no meeting of the minds regarding Paragraph 13(1) and the Union's work jurisdiction, further arbitration of this issue on the merits was beyond the scope of Arbitrator Larney's authority pursuant to the Agreement. Paragraph 53 of Article XVII provides that the arbitrator's authority is "limited to the construction and enforcement of the express language of this Agreement ... and the impartial arbitrator shall have no authority or jurisdiction, directly or indirectly, to add to, subtract from, change, modify, or supplement ... this Agreement."

With all due respect to Arbitrator Larney, his words here reveal a violation of the limits of his authority under the Agreement and to his obligation at law to interpret and apply the collective bargaining agreement. The issue before Arbitrator Larney was the intent of the parties; the interpretation of the paragraph at issue turned on such a determination; and as he admittedly states, there was no meeting of the minds with respect to Paragraph 13(1). Necessarily, Arbitrator Larney's award was based "on some body of thought, or feeling, or policy, or law that is outside the contract." *Ethyl*, 768 F.2d at 185, *quoting*, *United Steelworkers*, 363 U.S. at 597, 80 S.Ct. at 1361.

## CONCLUSION

Therefore, this Court finds that Arbitrator Larney's award did not draw its essence from the collective bargaining Agreement. The Plaintiffs' Motion is granted. The Defendants' Motion is denied. The Arbitration Award is vacated. Case terminated.

ENTERED this 19th day of January, 1994.

Michael M. Mihm
Chief United States District Judge

# UNITED STATES DISTRICT COURT
# CENTRAL DISTRICT OF ILLINOIS

## JUDGMENT IN A CIVIL CASE

JOHNSON CONTROLS INC., Systems
& Services Division
PNEUMATIC CONTROL SYSTEMS
COUNCIL

Plaintiffs

vs.

Case No. 93-1123
(Final Judgment
entered 1/21/94)

UNITED ASSOCIATION OF
JOURNEYMEN AND APPRENTICES OF
THE PLUMBING AND PIPE FITTING
INDUSTRY OF THE UNITED STATES
AND CANADA, AFL-CIO, LOCAL 353

Defendants

UNITED ASSOCIATION OF
JOURNEYMEN AND APRENTICES OF
THE PLUMBING AND PIPE FITTING
INDUSTRY OF THE UNITED STATES
AND CANADA, AFL-CIO, LOCAL 353

Counter-Claimants

vs.

JOHNSON CONTROLS INC.
PNEUMATIC CONTROL SYSTEMS COUNCIL

Counter-Defendants

☐ JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ DECISION BY THE COURT. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the plaintiffs and against the defendants.

ENTER this 20th day of January, 1994.

JOHN M. WATERS, CLERK

BY: DEPUTY CLERK

IN THE MATTER
OF THE ARBITRATION

BETWEEN

EMPLOYER
JOHNSON CONTROLS,
INC. SYSTEMS &
SERVICES DIVISION
PEORIA, ILLINOIS and
PNEUMATIC CONTROL
SYSTEMS COUNCIL

AND

UNION
UNITED ASSOCIATION
OF JOURNEYMEN AND
APPRENTICES OF THE
PLUMBING AND PIPE
FITTING INDUSTRY OF
THE UNITED STATES
AND CANADA, AFL-CIO; LOCAL 353

FMCS 90-26923

GRIEVANCE

DETERMINATION AS TO
WHETHER EMPLOYER
VIOLATED ARTICLE II,
PARAGRAPH 13(1) OF
THE NATIONAL
AGREEMENT BY
ASSIGNING DISPUTED
WORK TO NON-BARGAINING UNIT
EMPLOYEES

OPINION AND AWARD

(Decided February 3, 1994)

## PRELIMINARY INFORMATION
## CASE PRESENTATION - APPEARANCES

### EMPLOYER

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### UNION

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## CHRONOLOGY OF RELEVANT EVENTS[*]

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| Decision by the Arbitrator that the Subject Grievance Originating in the Company's Peoria Branch Office and Involving Eight (8) Union Locals Located in Central Illinois Was Substantively Arbitrable; Decision Rendered | May 19, 1992 |
| Post-Hearing Briefs Pertaining to the Merits Received by the Arbitrator: | |
| UNION | August 7, 1992 |
| EMPLOYER | August 8,1992 |
| By Letter Dated August 10, 1992 To the Parties, the Arbitrator Interchanged the Post-Hearing Briefs and Declared The Case Record on the Merits Officially Closed As Of the Date the Last Brief Was Received; | August 18, 1992 |
| Case Record Closed As of Decision by United States District Judge, Clyde S. Cahill, Wherein He Dismissed The Union's Suit to Vacate Arbitrator Thomas J. Erbs' Award Rendered October 5, 1990 Concerning The St. Louis Work Jurisdiction Grievance (Grievance 7- | August 18, 1992 |

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[*] This Chronology Section is a continuation of the Chronology Section set forth by the Arbitrator in the Opinion and Disposition he rendered in the matter of the subject grievance's substantive arbitrability.

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| 6-89), Cahill Holding that Arbitrator Erbs Did, In Fact, "Interpret" the Contract In His Ultimate Decision; Order Granting Employer's (Defendant) Motion For Summary Judgment and Denying Union's (Plaintiff) Motion For Summary Judgment and Further Order Dismissing the Matter Dated | |
| Letter Dated August 20, 1992 From Jeffrey C. Kauffman, One of the Attorneys for PCSC, Advising This Arbitrator of Judge Cahill's Decision to Dismiss the Union's Suit to Vacate Arbitrator Erbs' Award and Forwarding a Copy of Judge Cahill's Judgment and Memorandum Opinion Dated August 18, 1992; Letter and Copy of<br>Cahill's Opinion Hand Delivered to Arbitrator and Received by Him | August 20, 1992 |
| Letter to the Parties From the Arbitrator Acknowledging Receipt of Judge Cahill's *Judgment and Order and Memorandum and Order* Both Dated August 18, 1992 Forwarded to Him by Employer Counsel, Jeffrey C. Kauffman, and Apprising the Parties That, Upon His Review of Cahill's *Memorandum and Order*, the Arbitrator Found Judge Cahill's Holding Not to Be Inconsistent With the Arbitrator's Ruling on Arbitrability Rendered May 19, 1992, Stating the View That the Court Correctly Recognized Its Charge of Judicial Review of Erbs' Award to be Narrow, Thereby | August 24, 1992 |

Refraining From Revisiting the Merits of the Case Holding that Erbs Performed the Task For Which He Was Hired, Specifically that Erbs Interpreted a Section of the National Agreement Deemed by the Court to be Ambiguous and that Erbs Did So Without Exceeding His Authority; This Arbitrator Apprised the Parties That He Did Not Read Into Judge Cahill's Decision That The Court In Any Way Deemed Erbs' Decision To Be the Correct Holding Or That It Concurred In the Decision Rendered by Erbs; This Arbitrator Further Apprised the Parties That Even Assuming, Arguendo, the Court Was In Concurrence With Erbs' Decision, Such Concurrence Did Not Affect The May 19, 1992 Arbitrability Decision and, Additionally, Stating That It Was Irrelevant As To Whether Or Not the Court Vacated the Erbs' Award Relative to This Arbitrator's Finding That Pursuant to Paragraph 53 of the National Agreement, Each Specific Initiated Grievance Is To Be Decided On a Case-by-Case Basis; The Arbitrator Apprised That Notwithstanding These Determinations, He Would Incorporate Judge Cahill's Judgment and Order and the Accompanying Memorandum and Order As Part of the Record Evidence In This Instant Matter; Letter Dated

## ISSUE

In the absence of a joint stipulation of the issue and given the finding rendered by this Arbitrator previously that the issue is an arbitrable one, the following is an independent statement by each Party of the issue to be resolved on the merits.

### UNION

> Did Johnson Control's branch office in Peoria violate Paragraph 13 of the Agreement (Jt. Ex. lP) by assigning bargaining unit work to non-bargaining unit employees? (Tr. p. 13)
>
> If so, the Union requests as a remedy an Award declaring that the disputed work is covered by the Agreement (Jt. Ex. lP), specifically Article II, Paragraph 13 and ordering all affected employees to be made whole.

### EMPLOYER

> Whether the Company has violated the 1989-91 National Collective Bargaining Agreement (Jt. Ex. lP) between the Council and Union by assigning filter changing, oiling and greasing, belt adjusting, and other routine preventative maintenance work to Preventive Maintenance Inspectors (PMIs) at the Peoria branch?

## RELEVANT DOCUMENTATION
## APPLICABLE CONTRACT PROVISIONS (Jt. Ex. lP)

### ARTICLE II
### TRADE AND WORK JURISDICTION

13. (l) This Agreement covers the rates of pay, hours and working conditions of journeymen and apprentices engaged in the installation, service, and maintenance of all plumbing and/or pipe fitting systems, including pneumatic controls and mechanical equipment and component parts for all of the above which also includes fabrication, assembling, erection, installation, dismantling, replacement, repairing, reconditioning, adjusting, altering, calibrating, servicing of all plumbing and/or pipe fitting systems, pneumatic controls and/or mechanical equipment, and handling, unloading, distributing, reloading, tying-on, and hoisting of all piping materials, appurtenances and equipment used in connection to said plumbing or piping systems, pneumatic controls, and/or mechanical equipment, by any method, including all hangers and supports of every description and all other work included in the trade jurisdictional claims of the United Association.

(2) Any dispute over the meaning and interpretation of Paragraph 13 shall be immediately submitted to United Association representatives of the General Office on the one hand, and the Secretary of the Labor Relations Committee of the Council on the other (per Paragraph 51, Step 2). With the exception that if not settled within three (3) working days, the grievance shall be reduced to writing and submitted to

Arbitration as set forth in Steps 3 and 4 of Paragraph 51 of the Agreement.

* * * *

## PREAMBLE
## PARTIES TO THE AGREEMENT

* * * *

6. WHEREAS, the Employer is engaged in the pneumatic control systems industry throughout the United States and is known as a "National Pneumatic Control Contractor," and in the performance of such work requires the services of competent, skilled and qualified journeymen and apprentices; and

7. WHEREAS, the Union is affiliated with the American Federation of Labor and Congress of Industrial Organizations and has in its membership in local unions throughout the United States and Canada skilled and qualified journeymen and apprentices competent to perform all the work coming within the trade and craft jurisdiction in the pneumatic control systems industry; and

8. WHEREAS, the Employer and the Union desire to mutually establish and stabilize wages, hours and working conditions for journeymen and apprentices employed on a nationwide basis with said Employer; and

9. WHEREAS, to encourage closer cooperation and understanding between the Employer and the Union in the pneumatic control systems industry to the

end that satisfactory, continuous and harmonious labor relations exist between the parties to this Agreement;

* * * *

## ARTICLE I
## RECOGNITION

11. The Council recognizes the Union as the sole and exclusive bargaining representative for all journeymen and apprentices in the employ of the Employer with respect to wages, hours and other terms and conditions of employment, on any and all work in the pneumatic control systems industry described in Article II of this Agreement.

12. The management of the Employer's business including, but not limited to, the direction of the working force, the right to hire, to plan, direct, control and schedule all operations (including the scheduling of the work force), and the right to establish, eliminate, change or introduce new or improved methods, machinery, quality standards or facilities, is the sole and exclusive prerogative and responsibility of the Employer. All rights not specifically nullified by this Agreement are retained by the Employer.

## ARTICLE VIII
## SUPPLYING JOURNEYMEN AND APPRENTICES

* * * *

23. The Employer shall notify the local union to refer competent and skilled journeymen and apprentices as required.

* * * *

26. If a requirement for journeymen, competent and skilled in the work covered by this Agreement, exists, and such journeymen cannot be obtained under this Article, the Employer shall be permitted to hire and train persons, subject to the provisions of Article IV. It is understood that preference for such employment and training shall be given to journeymen with previous experience in the plumbing and pipe fitting industry.

* * * *

## ARTICLE XIII
## SUBCONTRACTING

* * * *

43. In order to secure work for employees working for the Employer under this Agreement, and in order to protect wages and working conditions of such employees, the Employer agrees to make reasonable effort to perform service and maintenance work covered by Article II, Paragraph 13 of this Agreement with employees covered by this Agreement. However, after such effort, the Employer reserves the right to subcontract the work referred to herein.

## BACKGROUND

As set forth in the May 19, 1992 Opinion and Disposition addressing the sole issue of the subject grievance's arbitrability, the Employer shall be referred to variously as Johnson Controls, Johnson, JCI, or the Company; the Union shall be referred to variously as the United Association, UA, or the Union; and together the Company and the Union shall be known as the Parties. Further, the voluntary unincorporated association known as the Pneumatic Control Systems Council to which Johnson is one of five (5) Company members and under whose auspices the National Collective Bargaining Agreement (Jt. Ex. lP) is negotiated on behalf of numerous companies signatory to the Agreement, shall be referred to herein as the Council.[1]

Historically, the Council and the Union entered into a formal collective bargaining relationship with the negotiation of an initial national collective bargaining agreement in early 1969. This occurred apparently as a result of the desire of companies operating in the pneumatic control systems industry to have a labor contract that better suited the unique aspects of their business as opposed to continuing to be party to the generic and much broader national construction agreement. According to the record evidence, until the initial national pneumatic control systems agreement became effective April 1, 1969, the pneumatic control employers continued operating under the 1965 National Construction Agreement (Un. Ex. 1-Stl.). At the outset, the Council and the Union were cognizant of the importance of trade or work jurisdiction of bargaining unit members vis-a-vis as encompassed by the type of work performed by companies in the pneumatic control system industry. That work involved plumbing and pipe fitting as related to the installation, service and maintenance of all pneumatic control systems, and component parts thereof and were associated primarily with new construction. As such, the Council and the Union agreed upon the following work jurisdiction clause as set forth in Article II, Paragraph 13 and guaranteed that work to be exclusively bargaining unit work as set forth in Paragraphs 14 and 15 which also follow as set forth below:

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[1] The other company members that comprise the Council are Barber-Colman Company, Honeywell, Inc., Landis & Gyr Powers, and Robertshaw Controls Company (Jt. Ex. lP, P16). In addition to these companies and Johnson Controls, other signatory companies are known to the Parties as either Associate member companies, those that are sponsored by, and licensees of the five (5) companies comprising the Council and Independent member companies, those companies that are not affiliated in any way with any of the other companies party to the Agreement. It is estimated that altogether, nationwide, there are approximately fifty (50) companies all inclusive that are signatories to the Agreement (Jt. Ex. lP).

## ARTICLE II
## TRADE AND WORK JURISDICTION

13. This Agreement covers the rates of pay, hours and working conditions of all journeymen and apprentices employed by the Employer doing plumbing and pipe fitting as related to the installation, service, and maintenance of all pneumatic control systems, and component parts thereof, including fabrication, assembling, erection, installation, dismantling, repairing, reconditioning, adjusting, altering, and servicing of said pneumatic control systems, and the handling, unloading, distributing, reloading, tying on, and hoisting of all piping materials, and appurtenances and equipment used in connection with said pneumatic control systems by any method, including all hangers and supports of every description, and all other work included in the trade jurisdictional claims of the United Association.

14. In recognition of the above work jurisdiction claims, it is understood and agreed that the assignment of work and the settlement of jurisdictional disputes involving any other building trades organizations, shall be settled and adjusted in accordance with the procedure established by the National Joint Board for the Settlement of Jurisdictional Disputes, or any successor agency of the Building and Construction Trades Department. There shall be no work stoppages because of jurisdictional disputes.

15. All journeyman and apprentice work tasks coming under this Agreement shall be assigned only to employees covered by this Agreement.

(Jt. Ex. 8-Stl.)

According to the record evidence, during the time the initial Agreement (Jt. Ex. 8-Stl.) was in force from April 1, 1969 to April 30, 1972, two (2) major problems presented themselves, one of which had to do with the assignment of bargaining unit work as set forth in Article II, Paragraph 13 to a class of "technicians" or other employees not covered by the Agreement. Although the Council and the Union did not modify in any way the language of Paragraph 13 in negotiations for the successor 1972 Agreement (Jt. Ex. 7-Stl.), they did address the problem nevertheless in side letters they each sent to their respective constituents about the problem and incorporating those side letters into the Agreement as Appendix B. In the letter dated February 25, 1972 sent by the Council to all of its member companies, the Council highlighted the problem of mis-assignments referencing them as occasional and apprised that with respect to this problem the Council and the Union were in complete agreement that "all work coming under the UA-PCSC Agreement shall be assigned only to members of the United Association." The Council went on to advise its constituent members that in order to comply with this commitment that had been made by the Council's Negotiating Committee, the companies were to include in a notice to field management of the Agreement's renewal, a statement of policy that it (each company) would comply with all terms of the 1972 Agreement, without exception, and with special emphasis on the commitment to assign work set out in Paragraph 13 to no one other than a member of the Union in accordance with Paragraph 15, the language of which was also left unchanged from the initial agreement.[2] In complying with the Council's directive, Johnson Controls Manager, Field Labor Relations, K.E Goetschel, sent an undated letter to the appropriate field managers apprising of the two problems and stating with respect to the work jurisdiction problem, the following:

> We wish to emphasize the fact that it is the Company's intent to comply with all the terms of this [1972] Agreement. We especially wish to reaffirm the policy of our company that all journeymen and apprentice work tasks coming under this agreement will be assigned only to employees covered by this Agreement.

(Jt. Ex. 7-Stl.)

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[2] It was further agreed as noted in this letter that samples of the notices from each company, as well as those to be sent by the Union addressing the second problem, that is the invocation of work stoppages by some local unions to force a settlement of grievances in violation of Paragraph 57 of the Agreement (Jt. Ex. 8-Stl.) were to be in the UA's and Council's hands before the successor 1972 Labor Agreement (Jt. Ex. 7-Stl.) was formally signed.

According to the record evidence, work jurisdiction had become a problem during the term of the initial Agreement (Jt. Ex. 8-Stl.) as a result of a transition that was taking place relative to the type of work the companies in the Pneumatic Control Systems industry was expanding into in response to changing economic conditions. Specifically, in response to declining work in the construction industry, the pneumatic control companies began competing with mechanical contractor companies for the service and maintenance work on heating, air conditioning, refrigeration, and other mechanical systems. According to the Union, part of this new work entailed scheduled periodic routine preventive service and maintenance of HVAC (heating, ventilation, air conditioning) equipment, including refrigeration and other mechanical systems which was provided as a result of prepaid service and maintenance contracts sold to customers. The record evidence reflects that in branching out into this type of work, the pneumatic control companies put themselves into direct competition with companies either members of or associated with a multi-employer group known as the Mechanical Contractors Association, hereinafter Association or MCA, which, like the Council, were party to a nationwide collective bargaining agreement with the Union, known as the National Mechanical Equipment Service Agreement. A review of the scope of work performed by companies signatory to the MCA Agreement, reflects that included as part of mechanical service and maintenance work performed on a contract basis are such tasks as cleaning and adjusting which are deemed to constitute the work known as preventive or routine maintenance (Jt. Ex. 4-Stl.).

M. Eddie Moore, Assistant General President of the Union, testified that he first became involved in negotiations for the Master Pneumatic Control Agreement in 1976 and it was at this negotiation he learned that in agreeing to language changes in the Work Jurisdiction clause, Paragraph 13, in the National negotiations for the 1974 Master Agreement, the Union had facilitated full-blown entry for the pneumatic companies into the business of mechanical equipment service and maintenance. The clause as rewritten reads as follows:

## ARTICLE II
## TRADE AND WORK JURISDICTION

> 13. This Agreement covers the rates of pay, hours, and working conditions of all journeymen and apprentices employed by the Employer doing plumbing and pipe fitting as related to the installation, service, and maintenance of all pneumatic control or other piping systems, and component parts thereof, including fabrication, assembling, erection, installation, dismantling, repairing, reconditioning, adjusting, altering, and servicing of said pneumatic control or other piping systems, and the handling, unloading, distributing, reloading, tying on, and hoisting of all piping materials, appurtenances, and equipment used in connection with said pneumatic control or other piping systems by any method, including all hangers and supports of every description, and all other work included in the trade jurisdictional claims of the United Association.
>
> (Jt. Ex. 6-Stl.)

Even though there was no specific reference to the work of preventive maintenance in connection with servicing mechanical systems, nonetheless, Moore asserted the Union gained all work of maintenance, including preventive maintenance, in agreeing to the revisions made in the language of Paragraph 13. Specifically, Moore explained, the work of preventive maintenance accrued unto the Union's jurisdiction through the three added references in the language of Paragraph 13 that declared, "or other piping" systems, which he asserted meant mechanical equipment.[3] Moore testified that at the time the 1974 National Agreement (Jt. Ex. 6-Stl.) was consummated, he was Business Manager of Local 602 in Washington, D.C. and he recalled receiving an instruction from the UA that pneumatic control companies could now go into the service work of refrigeration, air conditioning, and heating. The record evidence reflects that following the conclusion of the negotiations for the 1974 National Agreement, the incumbent UA General President, Martin J. Ward, by letter dated January 8, 1975 (Un. Ex. 3-Stl.), apprised all Local Union Business Representatives, among others, of the following, among other things:

> During the negotiation of this Agreement, it was fully understood and agreed by both the United Association and the Pneumatic Control Systems Council that the terms of this Agreement cover plumbing and pipe fitting on pneumatic controls, refrigeration equipment, industrial piping, pneumatic tube systems, and other piping or plumbing work performed by the Pneumatic

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[3] The Arbitrator takes judicial notice of the fact that in its post-hearing brief (p. 10), the Employer's position with respect to any pertinent comparisons between the 1972 and 1974 National Agreements was that the work jurisdiction clauses (Article II, Paragraph 13) remained unchanged in pertinent part. It appears, therefore, that the Employer does not attach any significance to the added reference of "or other piping" systems in the 1974 work jurisdiction clause, whereas the Union attaches a great deal of significance to the added language.

> Control Contractors. Paragraph 13 has been modified to clarify and avoid any misunderstanding.
>
> * * * *
>
> The United Association and the Pneumatic Control Systems Council have entered into this Agreement in good faith to protect the work of the United Association and to meet business requirements of the Pneumatic Control Industry. * * *

(Un. Ex. 3 - Stl.)

According to Joseph Shallbetter, Operations Manager of the Company's Peoria Branch, at least with respect to the Central Illinois area serviced by members of the eight (8) Union Locals who have an interest in this case, the limited amount of preventive maintenance work that existed in the period between 1974 and 1976 was performed by UA mechanics, meaning journeymen and apprentice plumbers.

Moore testified that in and around the same time the Union negotiated the Master Agreement in 1974 for the Pneumatic Control Industry, it also negotiated the Master Agreement in the Mechanical Equipment Industry. In the latter negotiations, Moore related the Union and the Mechanical Contractors agreed to add a new job classification known as Tradesman and that employees in this classification would perform all the tasks associated with the work of preventive maintenance, such as oiling and greasing and other such duties. Moore noted that even though Tradesman was a bargaining unit job, the pay for such position, relative to skilled journeymen and apprentice plumbers, was substantially lower, given the unskilled nature of the job. Moore explained that, in having reserved the work of preventive maintenance exclusively to journeymen and apprentice plumbers under the Pneumatic Control Industry Master Agreement, while at the same time negotiating a separate lower paid classification of Tradesman to perform the very same preventive maintenance work under the Mechanical Equipment Industry Master Agreement, the result was that in bidding for service contracts, the companies in the Mechanical Contractors Association gained a competitive edge over the companies in the Pneumatic Controls Industry. According to Moore, who was a participant in the national negotiations for the 1976 Master Agreement in the Pneumatic Control Industry, this competitive edge by the companies in the Mechanical Equipment Industry was viewed as a source of consternation and a problem that needed to be confronted in bargaining for the successor agreement to the 1974 Master Agreement. According to Moore, the Parties, in seeking to level the competitive playing field between the companies in the two industries, agreed to limit the scope of preventive maintenance work performed by the more highly paid skilled journeymen and apprentice plumbers so as to allow the companies to hire less skilled lower paid non-bargaining unit personnel to perform the bulk of the preventive maintenance work.[4] Moore explained that this change was accomplished by adding an entirely new section to Paragraph 13 of Article II that specifically addressed the work of mechanical equipment service and maintenance and delineated the individual tasks comprising this work. Moore noted that the first section which had previously constituted the whole of Paragraph 13 in the previous 1974 Master Agreement (Jt. Ex. 6 - Stl.) was left unchanged. The new section of Paragraph 13 denoted in the 1976 Master Agreement (Jt. Ex. 5 - Stl.) as 13(2) read, in whole, as follows:

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[4] It is noted that in ceding the bulk of the preventive maintenance work to lower paid personnel, the companies in the Pneumatic Controls Industry were enabled to compete better in the bidding process for scheduled service and maintenance contracts against companies in the Mechanical Equipment Industry who had on their payrolls employees in the lower paid classification of Tradesmen who performed such work.

> (2) The following mechanical equipment service and maintenance work tasks are included in this Agreement: repair and replacement of oil burners, boilers, boiler water feeders, low water cut offs, traps, strainers, valves, pumps, heating coils, interchangers, and converters of steam or hot water heating systems; the repair and replacement of cooling coils, compressors, condensers, evaporators, interchangers, and cooling towers of refrigeration systems including the replacement of parts, evacuation, and recharging of refrigeration equipment, and other repairs required to make unit and/or equipment operational, belt adjustment, oiling, greasing and cleaning of equipment when incidental to or part of the repair or replacement.

Moore explained that the language in the last line of this section referencing, "incidental to or part of the repair or replacement" was the language that restricted the scope of preventive maintenance work such as belt adjustment, oiling, greasing and cleaning of equipment that had previously been within the exclusive jurisdiction of the bargaining unit journeymen and apprentice plumber employees.[5]

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[5] Moore related that the new section of Paragraph 13 had come about in response to a proposal advanced by the Council and that UA Assistant General President, Gene Bradshaw, (continued...)

In a letter dated April 26, 1977 to All Business Representatives of Local Unions, among other UA officials (Un. Ex. 4 - Stl.), UA General President, Martin J. Ward, in advising of the changes made in the 1976 Master Agreement stated the following with respect to the Trade and Work·Jurisdiction clause, that is, specifically, with respect to the newly added section of Paragraph 13.

> Additional clarification as to work assignments on certain types of Mechanical Equipment Service has been added to this Article which changes will require a transition period to accomplish same and we seek your cooperation in this matter. (Un. Ex. 4 - Stl.).[6]

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[5](...continued)
functioning as the Chairman of the Union bargaining committee, in agreeing with the new section, relinquished the work of preventive maintenance, but not totally. According to Moore, Bradshaw's prime example, with respect to this new demarcation in work jurisdiction between bargaining and non-bargaining unit work as it related to the performance of preventive maintenance work, was that if a company had a contract to change one thousand (1,000) filters in an office building, such work could be performed by a non-bargaining unit employee, but that if such a filter change was required while a UA Mechanic (Journeyman or Apprentice Plumber) was performing the work of repair, replacement, et cetera, then the duty of making the filter change, which otherwise constituted preventive maintenance type work, was within the work jurisdiction of the bargaining unit.

[6] In its post-hearing brief, specifically in footnote 12, the Employer asserted that in 1977, the Union leadership explained
(continued...)

Whereas the Union asserts it ceded what might be referred to as the non-incidental preventive maintenance work to non-bargaining unit employees under the language of the new second section of Paragraph 13 in the 1976 Master Agreement (Jt. Ex. 5-Stl.), the Employer asserts the opposite, stating that this new second section added to the work jurisdiction of the bargaining unit by enumerating a number of specific tasks/duties and that, among these tasks/duties were belt adjustment, oiling, greasing and cleaning of equipment when those tasks/duties were incidental to or part of the repair or replacement. The Employer further asserts that these tasks/duties fell within the exclusive jurisdiction of the bargaining unit only when they were "incidental to" repair or replacement of parts and further, that said tasks/duties were not considered "service and maintenance" tasks for had they been so considered, "incidental to" language would necessarily have been rendered redundant. The Employer maintained there is no evidence to support a claim that the tasks/duties falling under the rubric of preventive maintenance were made the exclusive work of the bargaining unit under the terms of the 1974 Master Agreement (Jt. Ex. 6 - Stl.). To the contrary, the Employer asserts that non-bargaining unit employees performed preventive maintenance work before 1976, citing as support, the testimony of Council Member, Larry Smith, who

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[6](...continued)

to their membership and local officials that the new 1976-79 Council's work jurisdiction agreement "added" "work requirements on certain types of Mechanical Equipment service ..." If the Employer is basing this observation on the Union's letter dated April 26, 1977 (Un. Ex. 4 - Stl.), it appears that the Employer has mischaracterized what the letter stated as the term "added" had reference to additional clarification regarding work assignments and not work requirements.

drafted the "incidental to" language in negotiations for the 1976 Master Agreement (Jt. Ex. 5 - Stl.). Smith testified that in these negotiations, the Union proposed to add the UA Job Classification of Tradesman into the Master Agreement (PCSC Agreement), but that the Council rejected this proposal. Smith testified that the thrust of the "incidental to" language was to grant the UA jurisdiction over the work specifically referenced, preceding the words, "incidental to", namely, belt adjustment, oiling, greasing and cleaning of equipment. Smith testified he had worked for Honeywell, a Council company member, for thirty (30) years and that over the years prior to 1989, Honeywell had utilized non-bargaining unit employees to perform work characterized as preventive maintenance, more specifically, work not involving repairing or replacing, but rather work involving such tasks/duties as changing filters and belts. Smith, in his testimony, took issue with the intent of the language "or other piping" systems added to Paragraph 13 in the 1974 Master Agreement as conveyed by the Union, recalling this had to do with the fact that some of the signatory companies were in the sprinkler business, and that the language insured that these companies would be able to obtain the necessary labor to perform this work, and that it was not for the purpose of UA gaining work jurisdiction over mechanical equipment service and maintenance work. Smith conceded that, notwithstanding the "incidental to" language, in some cases UA Mechanics were performing both the "incidental to" work and the same tasks/duties of preventive maintenance that fell in the opposite category of non-incidental preventive maintenance work. Smith averred that the performance of such non-incidental preventive maintenance work by UA Mechanics in some cases did not arise out of any work jurisdiction language contained in the 1974 Master Agreement, but rather it came about as a matter of specific work assignments.

Eddie Moore testified that after the 1976 Master Agreement (Jt. Ex. 5 - Stl.) went into effect, two major problems arose, to-wit: (1) numerous complaints were relayed by the local unions that non-bargaining unit employees known at Johnson Controls as PMI's, an acronym for Preventive Maintenance Inspectors, were performing tasks/duties beyond the scope of preventive maintenance work; and (2) numerous complaints by the competitor companies in the Mechanical Contractors Association party to the National Mechanical Equipment Service and Maintenance Agreement that by their use of non-bargaining unit employees (at Johnson, PMI's and at Honeywell, Mech. Reps.) to perform duties beyond preventive maintenance, the pneumatic companies were bidding for service contracts on the basis of cheaper labor costs and, therefore, they were beating them out for these contracts. In effect, the mechanical contractor companies charged there existed a state of unfair competition. For reasons not disclosed in the voluminous record evidence submitted in this instant case, the Council and the Union did not act to remedy either or both problems through the bargaining of a successor agreement to the 1976 Master Agreement until 1986.[7] According to Moore, the Union, in its negotiation for the 1986 Master Agreement (Jt. Ex. 3 - Stl.) attempted to address the problems arising from the complaints by its local unions and the mechanical contractor companies by expanding the tasks/duties included in the second section of Paragraph 13. Moore related the Union was successful in adding the following work to its work jurisdiction under Paragraph 13(2).

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[7] Like the predecessor master agreements in 1974, 1972, and 1969, the 1976 Agreement in the Duration and Termination clause (Article XX) provided that the Agreement would, after its date certain of termination, here October 31, 1979, continue from year to year thereafter unless notice of termination or modification was given in writing by either party to the other party, sixty (60) days prior to each anniversary date of October 31.

1. boiler pressure safeties, fuel valves, gas pressure regulators, and flow control valves;

2. low pressure safeties, high pressure safeties, oil pressure safeties, expansion valves and liquid line solenoid valves; and

3. other incidental repairs required to make such mechanical systems and/or equipment operational.[8]

In a letter dated October 15, 1986 to All Business Representatives of local unions among other UA officials (Un. Ex. 5 - Stl.), UA General President, Marvin J. Boede apprised of the changes that were made in the 1986 Master Agreement (Jt. Ex. 3 - Stl.) stating the following with regard to Paragraph 13(2).

> Paragraph 13(2) defines the scope of service and maintenance work to include devices having both piped connections to system media piping and control terminations.

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[8] Additionally, a modification was made to the existing language by inserting the word "such" before equipment in the line that referenced preventive maintenance work so that the line now read, "belt adjustment, oiling, greasing and cleaning of such equipment when incidental to or part of the repair or replacement."

Additionally, Boede apprised that a new third section had been added to Paragraph 13 designated 13(3) that provided for the expedited handling of unresolved jurisdictional disagreements that might arise with respect to the agreement. This third section read as follows:

> (3) Any dispute over the meaning and interpretation of paragraph 13 shall be immediately submitted to United Association representatives of the General Office on the one hand, and the Secretary of Labor Relations Committee of the Council on the other (per paragraph 51, Step 2). With the exception that if not settled within three (3) working days, the grievance shall be reduced to writing and submitted to Arbitration as set forth in Steps 3 and 4 of Paragraph 51 of the Agreement.[9]

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[9] It is noted that not since the successor 1972 Master Agreement (Jt. Ex. 7 - Stl.) to the initial 1969 Master Agreement (Jt. Ex. 8 - Stl.) had the Council and the Union provided language in the Master Agreement under Article II to address the resolution of jurisdictional claims. However, the language in the 1986 Master Agreement differed from the language in the two predecessor agreements in that it made available the grievance procedure to handle claims arising over the meaning and interpretation, specifically of Paragraph 13, whereas in the 1969 and 1972 Master Agreements jurisdictional disputes only of the type involving other building trades organizations, as well as the assignment of work was to be settled and adjusted in accordance with the procedure established by the National Joint Board for the Settlement of Jurisdictional Disputes or any successor agency of the Building and Construction Trades Department.

According to Moore, the changes that were made to Paragraph 13(2) and the addition of Paragraph 13(3) in the 1986 Master Agreement (Jt. Ex. 3 - Stl.) did not correct the problems complained of by the local unions and the mechanical contractor companies and, as a result, the complaints continued to increase. The record evidence reflects that one such complaint came from UA Local 597 in Chicago. In a letter dated September 23, 1987, (Un. Ex. 16 - Stl.), Local 597 Business Representative Tom Cade apprised UA International Representative Francis J. Coyne that Johnson Controls "wishes to broaden the duties of the PMI employees by the following to do tube work on boilers (such as cleaning) also to install condensers and refrigeration equipment and to take reading of amperage of electric motors and to carry gauges to take readings on refrigeration equipment as to whether any additional refrigerant would be required ..." Cade stated he felt that if there was not a clarification of the intent of Paragraph 13(2), the situation would possibly "mushroom" and could be just the tip of the iceberg. Cade requested a reply as soon as possible, explaining that a member had called on September 22, 1987 to apprise that such work by a PMI was being implemented on a Sears account, and that the PMI was working on the job. The record evidence reflects that in response to Cade's letter, UA General President Marvin Boede met with Ken E. Goetschel, Executive Secretary of the Council, to discuss the PMI situation for the purpose of clarifying the matter. In a letter dated November 24, 1987 (Un. Ex. 17 - Stl.), Boede apprised Local 597 Business Manager, Francis X. McCartin, that he met with Goetschel on November 16, 1987, and that he and Goetschel reviewed the work scope in question as defined under Paragraph 13(2) of the 1986 Master Agreement (Jt. Ex. 3 - Stl.). Boede further apprised that Goetschel assured him that work assignments would be made in accordance with the Agreement and that Johnson Controls had no intention to expand the PMI's work tasks into the areas mentioned in Cade's letter. Boede went on to apprise that since its inception in the 1976 Master Agreement, many questions had been raised concerning the intent of Paragraph 13(2) and that 13(2) was revised in 1986 to clarify the intent of the phrase, "other incidental repairs required to make such unit and/or equipment operational." Boede apprised that according to a Memo of Understanding signed August 12, 1986, the intent of the Work Scope of the 1986 Master Agreement was that work covered is to be performed by UA employees defining the scope of service and maintenance to include devices having both piped connections to the system and control terminations. Boede continued, it was agreed that, in addition to the work task listed in the Agreement (Jt. Ex. 3 - Stl.), all work tasks on the boiler devices and refrigeration devices are intended to be included in the Agreement. Further, Boede apprised, Article II must be read in its entirety, referencing the phrase in Paragraph 13(2), "all other work included in the trade jurisdictional claims of the United Association." Boede then went on to state that certain scheduled maintenance inspections and work tasks have been accepted as the work assignments of PMI's, provided they are not a service call and are not incidental to or a part of a repair or replacement. Boede identified the accepted work assignments of PMIs to be as follows:

> Belt adjustment; oiling and greasing of pumps and motors, logging and tagging of equipment for proper lubrication; cleaning of equipment and replacement of air filters; water treatment sampling; [and visual systems inspection and the reporting of repairs ...].

Boede concluded by advising McCartin that PMI's could be organized and be brought into the bargaining unit.

The record evidence reflects that other formal complaints were received by the UA during the term of the 1986 Master Agreement regarding work assignments made to non-Union personnel employed at Johnson Controls For example, James H. Young, Business Agent of Local 189 in Columbus, Ohio, in a letter dated August 18, 1988 (Co. Ex. 5 - Stl.) to UA International Representative Donald F. McNamara, requested McNamara's assistance concerning disputed work assignments made by Johnson Controls to non-Union personnel. Young identified the work in question to be filter-changing, cleaning of equipment and various other duties at several locations in the Columbus area Young charged that, in his view, such work assignments constituted a violation of Paragraph 13(2) of the 1986 Master Agreement (Jt. Ex. 3 - Stl.). In turn, UA General President Boede forwarded this complaint to Goetschel at the Council and in a letter dated August 29, 1988, Goetschel apprised Boede, among other things, that "Local 189 should be reminded that Johnson Controls and other PCSC members are not in violation of the NPCSC [Agreement] if such preventive maintenance tasks are not part of repair or replacement and are performed by personnel other than UA members." As another example, Local 562 Business Manager Donald Devitt, by letter dated August 29, 1988 (Un. Ex. 8 - Stl.), apprised Rick Tinucci, Johnson Controls' St. Louis Branch Manager that it had come to the Local's attention the Company had hired a man to perform service work and that this represented a violation of Article VIII of the Master Agreement. Devitt concluded the letter by stating the union expected the problem to be rectified immediately. By letter dated August 31, 1988 (Un. Ex. 8 - Stl.), Tinucci responded to Devitt's complaint and allegation of a Contract violation by apprising Devitt of the following:

> Our new employee's job duties include belt adjusting, oiling, greasing and cleaning as allowed by Article II,

> Paragraph 13 of the UA National Pneumatic Control Systems Agreement. We in no way intend to use this employee to perform work that falls within Local 562 jurisdiction.
>
> The St. Louis Branch intends to honor the current and any future National Agreements to which we are signatory.

The record evidence reflects that, notwithstanding Tinucci's response, Devitt perceived a continuing problem which culminated in a request to UA General President Boede by letter dated October 11, 1988 (Un. Ex. 8 - Stl.) to arbitrate what Devitt characterized as a "serious problem in the St. Louis area." In this letter, Devitt apprised Boede that when the problem first occurred, the local union Business Representative Jim O'Mara met with Johnson Controls' official Ken McClendon and informed McClendon of the Contract violation and, at the same time, offered the Company the use of a tradesman to perform the disputed work, but that McClendon declined the offer, informing O'Mara that the Company did not want to set up another category. Devitt apprised Boede that one year previous to this meeting, the local union invited all contractors to a meeting held at the union hall of which Johnson Controls was an attendee, and that at this meeting the union fully explained how the contractors could use Tradesmen to be competitive. Devitt apprised Boede that the union had a Tradesman Program that had been in effect for over a year, and that presently, there were over 30 Tradesmen working in the industry. Devitt then went on to detail several violations concluding that between Johnson and Honeywell, [their use of non-union employees to perform so-called PMI work] was unfair to the union's other service contractors.[10]

The record evidence reflects that while the PSCS 1986 Master Agreement was still in effect, the UA negotiated a successor National Mechanical Equipment Service and Maintenance Agreement with the MCA and its Service and Maintenance Bureau (SMB) effective August 16, 1988 (Co. Ex. 17 - Stl.). Article VIII, the Classification of Employees clause, under Paragraph 25, provided the following with respect to Maintenance Tradesmen:

> 25. Maintenance Tradesmen must be qualified to perform and shall be allowed to perform the work listed below:
>
> > All routine maintenance and inspections regardless of size or location of the mechanical equipment being inspected or maintained, where this work is done as a periodic routine service, inspection and maintenance procedure by the Employer, such as:
> >
> > a) Filter changing and maintenance thereof
> > b) Oil and greasing
> > c) Belt adjusting or replacement

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[10] The record evidence before this Arbitrator contains similar complaints by other UA locals concerning Honeywell's use of non-union personnel to perform work the UA claimed fell within its work jurisdiction (See Co. Ex. 18 - Stl. and Co. Ex. 16 - Stl.).

d) Cleaning of cooling towers, coils, evaporator and condenser tubes and water treatment
e) General housekeeping
f) Delivery and truck driving of parts or equipment trucks
g) Systems operation under contract with customer
h) in an area where a problem exists with non-UA competition, the assignment of tradesmen duties may be adjusted to meet local conditions
i) Cleaning and routine maintenance of solar energy equipment and HVAC power electronics control devices and the electronic side of building automation systems

(Co. Ex. 17 - Stl.)

Moore asserted in his testimony that it was in response to these complaints that centered around Johnson's use of PMIs and Honeywell's use of Mech Reps that prompted the Union to reopen the Master Agreement in 1988. Moore testified that in the Union's view, PMIs were the main issue in the 1988 negotiations. According to Moore, it was the Union's objective to eliminate PMIs and that this issue was so "big" that the Union was willing to go so far as to give up the Master Agreement.[11] Meeting notes taken by the UA at the first bargaining session held on October 6, 1988 (Un. Ex. 19 - Stl.) reflect the following with regard to the Union's intent in these negotiations:[12]

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[11] Moore explained that in other situations the Union unilaterally develops a national agreement, and it is up to the individual contractors as to whether they sign and become a (continued...)

> Chairman Moore opened the meeting and explained the history of UA-NCA negotiations and why the UA has requested to reopen the Agreement. The main reason being the difference between the PCSA and the NMES&M Agreement, and the UA does not want different agreements and working conditions for refrigeration and air-conditioning service and maintenance work.

At the second bargaining session held November 1, 1988, the UA Meeting Notes (Un. Ex. 20 - Stl.) reflect the following with respect to the Union's position regarding Paragraph 13(2):

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[11](...continued)
party to the agreement. In other words, there is no negotiation that takes place with respect to these national agreements and in this regard, the situation involving the Pneumatic Council is different.

[12] According to the record evidence, the Council and the UA met a total of ten (10) times in bargaining sessions beginning October 6, 1988 and ending March 22, 1989. The specific dates of these bargaining sessions were:

October 6, 1988
November 1, 1988
November 15, 1988
December 13, 1988
January 11, 1989
January 12, 1989
February 7, 1989
February 8, 1989
March 21, 1989
March 22, 1989

> After a complete discussion of all proposals, Mr. Moore let the PCSC know that the UA is taking a very strong stand on Article II, Paragraph 13(2), our work jurisdiction, in particular, belt adjustment, oiling, greasing, etc. If we cannot get it resolved, we will have to reassess our position on whether we want the Agreement or not. Mr. Tarkowski [Chairman of the Council's bargaining committee] explained they would have to go to their Executive Committee on this before they could move. He asked about the rest of the UA proposals and Mr. Moore indicated we could clear them up in short order if we come to agreement on 13(2).

In its first proposal to the Council, the record evidence reflects the UA attempted to address its objectives regarding work jurisdiction in two ways, to-wit: (1) It proposed adding two new paragraphs to the preamble section, Parties to the Agreement, the thrust of which was to clarify the fact the signatory companies were in the business of service and maintenance of mechanical equipment and to specifically state that among other work reserved to UA employees was the work of preventive maintenance; and (2) It proposed adding three new sub-sections to Paragraph 13, all pertaining to an enumeration of work tasks/duties that were covered by the Agreement with one of these new sub-sections detailing the particular tasks/duties falling under the category of work referenced routine maintenance and inspection (Co. Ex. 1 - Stl.).

At the third negotiating meeting held November 15, 1988, the UA Meeting Notes (Un. Ex. 21 - Stl.) reflect that with respect to the Union's proposed new sub-section 4 of Paragraph 13 referencing specific tasks/duties of routine maintenance and inspection work, a discussion occurred centering about the use of tradesmen or apprentices on belts, oiling and greasing, etc.

and indicating that the contractors see a problem with their companies understanding or going along with this.

The UA Meeting Notes of the fourth bargaining session held December 13, 1988 (Un. Ex. 22 - Stl.) reflect that prior to getting into the negotiations the Council wanted to express a number of points with regard to the UA's proposal on Paragraph 13. Two of the six (6) points noted, the ones most pertinent to the case at bar were the following:

* * * *

> 3) Expanding UA jurisdiction causes problems for both company and union, competitiveness and job loss.

* * * *

> 5) Routine Maintenance - they can't ask their salaried people to join union and if fitters do work, cost goes up (Pipefitters don't want menial work and UA can't supply tradesmen).

The notes further reflect that Moore responded to all six (6) points stating, among other things, that the work the Council was worried about was traditional work of the UA that had been performed for the last 75 years, whereas the member companies had only been in the business (referring to mechanical equipment service and maintenance) for the last 14 years (since about 1974). The notes reflect a continuing dialogue occurred between the Council and UA with respect to Paragraph 13 at this meeting and that, whereas the UA put forth several options such as, for example, eliminating or rewriting Article XVIII, the No Strike, No Lockout clause to allow the Union to picket for organizing PMIs (tech reps) or, in the alternative, to picket when non-union personnel was performing bargaining unit work, the Council did not produce any concrete proposals of its own to address the issues raised in connection with Paragraph 13.

The UA Notes of the fifth bargaining session (Un. Ex. 23 - Stl.), held January 11, 1989, reflect that the Council informed the Union it was their estimate that there were between two to three hundred salaried employees throughout the country that were performing PMI type work and then read a list of duties the Council viewed that the salaried employees could perform without being in violation of the Agreement. As characterized by the UA in its notes, this list was extremely long and seemed to cover everything but installation and replacement of pneumatic or mechanical equipment. The Council declined to give a copy of this list of duties to the Union according to the UA notes. Additionally, the UA recorded in its notes that a lengthy discussion ensued regarding the various problems the Union faced with respect to this Agreement, that the Council acknowledged its understanding of these problems, but that, nevertheless, the Council did not have any proposals to present to the Union. At this juncture, the UA presented to the Council a complete Agreement as its second proposal (Co. Ex. 2 -Stl.) and briefly gave an explanation of the most important differences between the proposed agreement and the existing agreement (Jt. Ex. 3 - Stl.). A comparison of the two agreements relevant to the work jurisdiction issue reveals the following changes:

1) Paragraph 6 of the Preamble section, Parties to the Agreement, was restated.

a) 1986-88 Agreement (Jt. Ex. 3 - Stl.)
Paragraph 6 -

WHEREAS, the Employer is engaged in pneumatic control systems, industry throughout the United States and is known as a 'National Pneumatic Control Contractor,' and in the performance of such work requires the services of competent, skilled and qualified journeymen and apprentices; and

b) UA Proposed Agreement (Co. Ex. 2 - Stl.)
Paragraph 6 -

WHEREAS, the Employer is engaged in the plumbing and pipe fitting industry throughout the United States, and in the performance of such work requires the services of competent, skilled and qualified employee, and

2) Article II, Paragraphs 13, 14 and 15, the Trade/Work Jurisdiction clause was redrafted.

a) 1986-88 Agreement

13. (1) This Agreement covers the rates of pay, hours, and working conditions of all journeymen and apprentices employed by the Employer doing plumbing and pipe fitting as related to the installation, service, and maintenance of all pneumatic control or other piping systems, and component parts thereof, including fabrication, assembling, erection,

installation, dismantling, repairing, reconditioning, adjusting, altering, and servicing of said pneumatic control or other piping systems, and the handling, unloading, distributing, reloading, tying on, and hoisting of all piping materials, appurtenances, and equipment used in connection with said pneumatic control or other piping systems by any method, including all hangers and supports of every description, and all other work included in the trade jurisdictional claims of the United Association.

(2) The following mechanical equipment service and maintenance work tasks are included in this Agreement: Repair and replacement of oil burners, boilers, boiler water feeders, low water cut-offs, traps, strainers, valves, pumps, heating coils, interchangers, and converters of steam or hot water heating systems, boiler pressure safeties, fuel valves, gas pressure regulators, and flow control valves; the repair and replacement of cooling coils, compressors, condensers, evaporators, interchangers, low pressure safeties, high pressure safeties, oil pressure safeties, expansion valves, pressure regulators, hot gas bypass valves and liquid line solenoid valves, and cooling towers of refrigeration systems including the replacement of parts, evacuation, and recharging of refrigeration equipment; belt adjustment, oiling, greasing and cleaning of such equipment when incidental to or part of the repair or replacement; and other incidental

repairs required to make such mechanical systems and/or equipment operational.

(3) Any dispute over the meaning and interpretation of paragraph 13 shall be immediately submitted to United Association representatives of the General Office on the one hand, and the Secretary of the Labor Relations Committee of the Council on the other (per Paragraph 51, Step 2). With the exception that if not settled within three (3) working days, the grievance shall be reduced to writing and submitted to Arbitration as set forth in Steps 3 and 4 of Paragraph 51 of the Agreement.

14. There shall be no work stoppages because of jurisdictional disputes.

15. All journeyman and apprentice work tasks coming under this Agreement shall be assigned only to employees covered by this Agreement.

b) UA Proposed Agreement

(13) 1. This agreement covers the rates of pay, hours and working conditions of all employees engaged in the installation, service, and maintenance of all plumbing and/or pipe fitting systems including but not limited to pneumatic controls and mechanical equipment service and component parts for all of the above which also includes fabrication, assembling, erection, installation, dismantling, replacement, repairing, reconditioning, adjusting, altering, servicing of all plumbing, and/or pipefitting

systems, pneumatic controls, and/or mechanical equipment service, and handling, unloading, distributing, reloading, tying-on, and hoisting of all piping materials, appurtenances and equipment used in connection to said plumbing or piping systems, pneumatic controls, and/or mechanical equipment service, by any method, including all hangers and supports of every description and all other work included in the trade jurisdictional claims of the United Association.

2. Any dispute over the meaning and interpretation of paragraph 13 shall be immediately submitted to United Association representatives of the General Office on the one hand, and the Secretary of the Labor Relations Committee of the Council on the other, with the exception that if not settled within three (3) working days, the grievance shall be reduced to writing and submitted to arbitration as set forth in Steps 3 and 4 of paragraph 52 of the agreement.

3. In recognition of the above work jurisdictional claims, it is understood that the assignment of work and settlement of jurisdiction disputes with other Building Trades organizations shall be adjusted in accordance with the procedures established by the Impartial Jurisdictional Disputes Board or any successor agency of the Building and Construction Trades Department.

(14) There shall be no sit-down or work stoppage by the employees because of jurisdictional disputes.

(15) All work coming under this agreement shall be assigned only to employees covered by this agreement.

3) Addition of an entirely new Article establishing the Job Classification of Maintenance Tradesmen

a) UA Proposed Agreement[13]

ARTICLE X

MAINTENANCE TRADESMEN

36) Maintenance Tradesmen must be qualified to perform and shall be allowed to perform the work below:

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[13] It is noted that with but two (2) differences, the proposed new Article X was virtually identical to Article VIII, Paragraph 25 pertaining to the Job Classification of Maintenance Tradesmen contained in the 1988 National Mechanical Equipment Service and Maintenance Agreement (Co. Ex. 17 - Stl.) (see also p. 21 of this Award, Supra). Those two differences were as follows: (l) In Item i) on the list of enumerated duties, the proposed agreement added repairing and eliminated the phrase, and the electronic side of building automation systems; and (2) the proposed agreement added a second section to the Article that is not contained in the Mechanical Master Agreement.

1. All routine maintenance and inspections regardless of size or location of the mechanical equipment being inspected or maintained, where this work is done as a periodic routine service, inspections and maintenance procedure by the Employer, such as:

   a. filter changing and maintenance thereof
   b. oil and greasing
   c. belt adjusting or replacement
   d. cleaning of cooling towers, coils, evaporator and condenser tubes and water treatment
   e. general housekeeping
   f. delivery and truck driving of parts or equipment trucks
   g. systems operations under contract with customer
   h. in an area where a problem exists with non-union competition, the assignment of tradesmen duties may be adjusted, by written agreement to meet local conditions
   i. cleaning, repairing, and routine maintenance of solar energy equipment and HVAC power electronics control devices

2. Where there is no legal service and maintenance agreement establishing a "Maintenance Tradesmen" classification, including rate and fringes for such classification, the basic hourly wage rate for

> this classification shall be established at a rate of 50% of the service and maintenance journeymen hourly wage. The Employer may carry an employee with the Tradesmen classification on a health/welfare plan from an alternate source, and shall carry said employee on the UA National Pension Plan. The Employer shall contribute one (1) dollar per hour for each hour worked to the Plumbers and Pipefitters National Pension Fund.

The UA Notes of the sixth bargaining session held on January 12, 1989 (Un. Ex. 24 - Stl.) reflect that the Council indicated it had reviewed the Union's proposed Agreement (Co. Ex. 2 - Stl.) and that in so doing, it had identified a total of nineteen (19) changes of which they viewed three (3) as being major in nature and then requested the Union to provide an explanation regarding the kind of complaints and problems it was receiving concerning the non-union PMIs (Techs). In response, the Union related that complaints came from Business Managers of local unions claiming that the Master Agreement undermines other National Agreements and Local Agreements and complaints came from contractors who claimed they were rendered non-competitive against Council contractors. The Union further explained the main problem was the abuse by Council contractors of the use of PMIs (Techs) on commercial work and the use of Instrument Techs on industrial construction and maintenance projects. According to the UA Notes, the Council and the Union adjourned after caucusing and agreed to reconvene on February 7, 1989 and to extend the Current Agreement (Jt. Ex. 3 - Stl.) to February 10, 1989.

In a Memorandum dated January 23, 1989 (Un. Ex. 9 - Stl.), UA General President Boede apprised all Building Trades

Local Unions in the United States that the Union was attempting to negotiate a new National Pneumatic Control Systems Agreement, and that the crux of the changes proposed by the Union related to a series of difficulties reported by many local unions throughout the country concerning the Trade and Work Jurisdiction provision of the Agreement (Jt. Ex. 3 - Stl.). Boede further apprised it was the intention of the UA to do all in its power to reach a fair resolution of the dispute and continue to have a national agreement which protects and preserves the work opportunities for the members of the UA.

According to UA Notes of the seventh and eighth bargaining sessions held on February 7 and 8, 1989 (Un. Ex. 25 - Stl.), the Council opened the negotiations by re-capping where each side was respectively and stating, among other things that the UA's proposal to include the Job Classification of Maintenance Tradesmen to perform non-skilled work that had been performed by non-bargaining unit employees for years was a non-mandatory subject of bargaining, and as such, it refused to bargain any further with regard to that proposal. The Council clarified its position, stating its refusal to bargain on the Maintenance Tradesmen category concerned an expansion of the bargaining unit but did not extend to bargaining with respect to the scope of work. The Union responded that it was not attempting to organize the PMIs (Techs) that what it was bargaining was the scope of work and that the Council did not have to use tradesmen unless they wanted to. According to the UA's notes, the Union offered to take the new Article on Maintenance Tradesmen out and leave the [proposed] agreement as is. With respect to the enumerated duties of the Tradesmen, the Union offered to put it back into either

Paragraph 13(1) or (2) as an exclusion.[14] At the beginning of the bargaining session on February 8, 1989, the Council presented a proposal regarding Paragraph 13(1) and (2) to which the UA responded it had problems with the proposal, stating it felt strongly that the duties listed in the proposed Paragraph 36 (1), items (a) through (i) was bargaining unit work with or without the inclusion of a Tradesmen category and that the Union objected to non-bargaining unit men performing routine maintenance. Following discussion of another Council proposal, the Union stated there were a lot of unsettled problems/questions pertaining mostly to routine maintenance that the Council and the Union seemed unable to resolve and suggested that the existing Agreement (Jt. Ex. 3 - Stl.) be extended sixty (60) days and a termination date of April 9, 1989 be set. The Union explained that on April 9th, the Contractors would have several options, to-wit: they could sign local or national agreements, such as NCA (extend to commercial work) or the NMES & M Agreement (Co. Ex. 17 - Stl.); or they could sign a UA developed Independent Pneumatic Control Systems Agreement; or they could operate without the UA. The Union agreed to meet in further bargaining sessions during the sixty (60) day extension, but declined the Council's suggestion of submitting the talks to federal mediation. In response to a Council's request for the Union to make a list of what UA tasks should be covered by the Master Agreement, the Union stated, "inspect, test and perform preventive maintenance on mechanical systems (including belt adjustment, oiling, greasing and cleaning of equipment) from Johnson Controls' list of SSI Level I duties."

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[14] It appears, based on subsequent reported statements articulated by the Union, and positions taken in negotiations that the reference to "exclusion" was incorrect.

The Council and the Union agreed to reconvene in bargaining on March 21 and 22, 1989.

In a Memorandum dated February 13, 1989 (Un. Ex. 10 - Stl.), UA General President Boede apprised all Building Trades Local Unions in the United States that bargaining to date had not resulted in a new national agreement and that a deadline date of April 9, 1989 had been set as a termination date for the 1986 Master Agreement (Jt. Ex. 3 - Stl.). Boede further apprised additional negotiation meetings had been scheduled prior to April 9th, but that in any event, in the interim period, the UA would develop a new national agreement which would be available for signing by any contractor presently working under the existing Master Agreement. Boede advised the local unions they would be notified in ample time prior to the April 9th deadline date of what action they might have to take to make sure their members were protected in any transition period.

As the UA had apprised the Council at the conclusion of the February 8th bargaining session and its local unions in its Memorandum of February 13th, it unilaterally developed a new National Control Systems Agreement (Co. Ex. 8 - Stl. and Un. Ex. 15 - Stl.) which it distributed to all its Building Trades Local Unions in the United States (Un. Ex. 14 - Stl.) and to the Council Member companies (Un. Ex. 13 - Stl.), the Associate Member companies (Un. Ex. 12 - Stl.) and to the Independent companies (Un. Ex. 11 - Stl.) by transmittal letter dated March 6, 1989. In the transmittal letter, of which there were two versions with but little difference, one to the local unions and the other to the signatory companies, the Union apprised that the major differences between the existing Master Agreement (Jt. Ex. 3 - Stl.) and the developed Agreement (Co. Ex. 8 - Stl. and Un. Ex. 15 - Stl.) was a deletion of all references to the "Pneumatic Council," a rewritten work jurisdiction clause renumbered as paragraph 8 under Article II for the purpose of more clearly defining the work jurisdiction of the UA and establishment of a new grievance procedure. The new Article II in the developed agreement read as follows:

## ARTICLE II

## TRADE OR WORK JURISDICTION

(8) 1. This agreement covers the rates of pay, hours and working conditions of all employees engaged in the installation, service, and maintenance of all plumbing and/or pipe fitting systems including but not limited to pneumatic controls and mechanical equipment and component parts for all of the above which also includes fabrication, assembling, erection, installation, dismantling, replacement, repairing, reconditioning, adjusting, altering, calibrating, servicing of all plumbing, and/or pipefitting systems, pneumatic controls, and/or mechanical equipment, and handling, unloading, distributing, reloading, tying-on, and hoisting of all piping materials, appurtenances and equipment used in connection to said plumbing or piping systems, pneumatic controls, and/or mechanical equipment, by any method, including all hangers and supports of every description and all other work included in the trade jurisdictional claims of the United Association.

2. Any dispute over the meaning and interpretation of paragraph 8 shall be immediately submitted to United Association

representatives of the General Office on the one hand, and the Employer on the other, with the exception that if not settled within three (3) working days, the grievance shall be reduced to writing and submitted to arbitration as set forth in the grievance and arbitration procedures of Article XVII.

(9) In recognition of the above work jurisdictional claims, it is understood that the assignment of work and settlement of jurisdiction disputes with other Building Trades organizations shall be adjusted in accordance with the procedures established by the Impartial Jurisdictional Disputes Board or any successor agency of the Building and Construction Trades Department.

(10) There shall be no sit-down or work stoppage by the employees because of jurisdictional disputes.

(11) All work coming under this agreement shall be assigned only to employees covered by this agreement.

(Un. Ex. 15 - Stl.)[15]

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[15] A comparison between the developed Article II and the Article II contained in the 1986 Master Agreement reflects that Paragraph 8(1) was an attempt on the part of the UA to merge Paragraphs 13(1) and (2). In the rewriting, the UA dropped phrases and added new ones in their place and added two new (continued...)

Subsequent to the distribution of the developed Agreement, the Council and the Union reconvened negotiations on dates of March 21 and 22, 1989. According to the UA Notes of these meetings (Un. Ex. 26 - Stl.), the Council presented a counterproposal to the Article II contained in the developed

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[15](...continued)
functions of "replacement" and "calibrating." The following are phrases dropped and added:

Dropped: "employed by the Employer doing plumbing and pipe fitting as related to the"
Added: "engaged in the"

Dropped: "pneumatic control or other piping systems"
Added: "plumbing and/or pipe fitting systems including but not limited to pneumatic controls and mechanical equipment"

Dropped: "thereof, including"
Added: "for all of the above which also includes"

Dropped: "said pneumatic control or other piping systems"
Added: "All plumbing, and/or pipe fitting systems, pneumatic controls, and/or mechanical equipment"

It is noted that changes were also effected to the other sections of Article II as well.

Agreement (Un. Ex. 15 - Stl.) This counterproposal reads as follows:

Replace Paragraph 8(1) with the following:

(8) 1. Subject to subparagraph (2), below, this Agreement covers the rates of pay, hours and working conditions of journeymen and apprentices engaged in the installation, service, and maintenance of all plumbing and/or pipe fitting systems, including pneumatic controls and mechanical equipment and component parts for all of the above which includes fabrication, assembling, erection, installation, dismantling, replacement, repairing, reconditioning, adjusting, altering, calibrating, servicing of all plumbing (at non-industrial sites) and/or pipefitting systems, pneumatic controls and/or mechanical equipment, and handling, unloading, distributing, reloading, tying-on, and hoisting of all piping materials, appurtenances and equipment used in connection to said plumbing or piping systems, pneumatic controls, and/or mechanical equipment, by any method, including all hangers and supports of every description and all other work included within the trade jurisdiction claims of the United Association.

Replace paragraph 8(2) with the following:

2. Non bargaining unit employees of the Employer or the Employer's vendors or contractors may perform work relating to:

(a) testing, monitoring and diagnosing performance problems,

(b) electronic controls,

(c) computer and communications systems,

(d) work for the purpose of instruction and training; and work when done on a scheduled basis (not as incidental to the work performed pursuant to subparagraph l, above), as follows:

(1) Filter changing and maintenance thereof
(2) Oiling and greasing
(3) Belt adjusting or replacement
(4) Cleaning of cooling towers, coils, evaporators and condenser tubes
(5) Testing and monitoring water treatment systems
(6) General housekeeping or cosmetic work
(7) Delivery and driving of parts and equipment delivery trucks
(8) Systems operation under contracts with customers

Change designation for paragraph 8(2) to paragraph 8(3). Also replace word 'employer' with 'Secretary of Labor Relations Committee of the Council.'

In Paragraph 10, remove the words 'by the employees'.

(Un. Ex. 18 - Stl.)

According to the UA Notes, after reviewing the Council's counterproposal, the Union stated its opposition mainly to Paragraph 8(1) and 8(2) and took the position that under the Interim Agreement effective April 9, 1989, the work in 8(2) would be performed by the UA. The Council stated it felt it was unfair of the UA to attempt to eliminate the PMI's (Tech Reps) after 13 years of using them and that the Union responded its effort to do so was as a result of abuse of using Tech Reps on routine maintenance. The notes further reflect that the Council agreed to take its proposed 8(l) language as amended to replace sections 1 and 2 of Paragraph 13 in the 1986 Agreement. The final Agreement with respect to Article II is reflected in the successor 1989 Master Agreement (Jt. Ex. lP) which reads as follows:

> 13. (1) This Agreement covers the rates of pay, hours, and working conditions of journeymen and apprentices engaged in the installation, service, and maintenance of all plumbing and/or pipe fitting systems, including pneumatic controls and mechanical equipment and component parts for all of the above which also includes fabrication, assembling, erection, installation, dismantling, replacement, repairing, reconditioning, adjusting, altering, calibrating, servicing of all plumbing and/or pipe fitting systems, pneumatic controls and/or mechanical equipment, and handling, unloading, distributing, reloading, tying on, and hoisting of all piping materials, appurtenances, and equipment used in connection to said plumbing or piping systems, pneumatic controls and/or mechanical equipment, by any method, including all hangers and supports of every description, and all other work included in the trade jurisdictional claims of the United Association.
>
> (2) Any dispute over the meaning and interpretation of paragraph 13 shall be immediately submitted to United Association representatives of the General Office on the one hand, and the Secretary of

> the Labor Relations Committee of the Council on the other (per Paragraph 51, Step 2). With the exception that if not settled within three (3) working days, the grievance shall be reduced to writing and submitted to Arbitration as set forth in Steps 3 and 4 of Paragraph 51 of the Agreement.
>
> 14. There shall be no work stoppages because of jurisdictional disputes.
>
> 15. All journeyman and apprentice work tasks coming under this Agreement shall be assigned only to employees covered by this Agreement.
>
> (Jt. Ex. lP)

In a letter dated May 19, 1989, (Un. Ex. 6 - Stl.), UA General President apprised all Building Trades Local Unions in the United States that a new National Pneumatic Control Systems Council Agreement had been negotiated effective March 31, 1989 and that the only change in the Agreement was to Article II, specifically that Paragraph 13(2) had been eliminated and a new Paragraph 13 agreed to. Boede noted that the word calibrating had been added to the wording and that the changes made in the Paragraph were intended to eliminate confusion and to strengthen the claims of its rightful jurisdiction.

A comparison of the new Paragraph 13 in the 1989 Agreement (Jt. Ex. lP) with paragraph 8(1) promulgated by the Union in its developed Agreement (Un. Ex. 15 - Stl.) reflects the two paragraphs are virtually identical. The only differences are that in the developed Agreement, the word employees was used instead of journeymen and apprentices and that in the new Paragraph 13, journeymen and apprentices was restored to the language in place of employees and the phrase "but not limited to" that appeared in Paragraph 8(1) line 4 after the word "including" but before the word "pneumatic" was deleted.

Moore testified that agreement was reached on Paragraph 13 the last day of negotiations because the Council had accepted virtually all of the language that constituted Paragraph 8(1) in the developed Agreement (Un. Ex. 15 - Stl.) and because the Council agreed to drop Paragraph 8(2) from its counterproposal [Un. Ex. 18 - Stl.] which set forth specific tasks/duties that constituted work that could be performed by non-bargaining unit employees. According to Moore, the Union took the position in negotiations that with the exception of three (3) duties listed, the remaining work set out in the proposed Paragraph 8(2) belonged within the UA's jurisdiction.[16] Moore recalled that in agreeing to drop its proposed Paragraph 8(2), Jim Tarkowski, Manager for Human Resources at Johnson Controls and Chairman of the Council's bargaining committee, remarked in the form of a question, "[w]hat are we going to do with the PMI's?", to which he (Moore) responded, [t]hat's your problem, there are other duties for the PMI's." Moore explained that the other duties he was referring to were any duties not under the trade jurisdiction of the UA. Moore related in his testimony that by agreeing to Paragraph 8(1) as slightly modified by the Council, the Union did not press to retain Paragraph 13(2) as set forth in the 1986 Master Agreement as it viewed this paragraph as being unnecessary, given the rewritten Paragraph 8(1).[17] Moore asserted in his testimony that the concession originally granted by the UA with respect to its jurisdiction over preventive maintenance work in 1976 and continued in the 1986 Master Agreement (Jt. Ex. 3 - Stl.) evidenced by the "incidental to" language that appeared in Paragraph 13(2) of both the 1976 and 1986 Agreements was rescinded by the new language of Paragraph 13 in the 1989 Agreement (Jt. Ex. lP).[18] In other words, Moore related, the new language brought back all the preventive maintenance work within the jurisdiction of the UA where it had resided prior to the 1976 Agreement (Jt. Ex. 5 - Stl.).

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[16] The three (3) exceptions were: (1) Item 2(b) - electronic controls; (2) Item 6 - General housekeeping or cosmetic work; and (3) Item 7 - Delivery and driving of parts and equipment delivery trucks. The Arbitrator notes as an interesting aside that when the UA tendered its second proposal in these negotiations, proposing, among other things, the establishment of the Job Classification of Maintenance Tradesmen, that it listed among the duties of this classification general housekeeping and the delivery and truck driving of parts or equipment trucks. In any event, Moore asserted he was not amenable to making specific reference in the Master Agreement to work that was not work within the UA's jurisdiction.

The record evidence reflects that approximately a week after the conclusion of the last bargaining session, Tarkowski, as Spokesman for the Council's Labor Relations Committee, advised Moore in a letter dated March 28, 1989 (Co. Ex. 9 - Stl.) that the Executive Committee of the Council had approved the text of a letter that had been sent to the

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[17] It is noted in the developed Agreement (Un. Ex. 15 - Stl.), unilaterally written by the UA, that the UA was the party who had dropped from Article II, the entire Paragraph of 13(2).

[18] The specific language referenced here is, "belt adjustment, oiling, greasing and cleaning of such equipment when incidental to or part of the repair or replacement."

Management of each respective company, informing them of the newly negotiated 1989 Master Agreement (Jt. Ex. lP). Tarkowski concluded the letter by advising Moore that if he had any questions or comments he should not hesitate to contact him (Tarkowski). The letter sent by the Council to the various companies reads as follows:

> The PCSC and the United Association of Plumbers and Pipefitters have negotiated a new two-year agreement, effective March 31, 1989. The only change is in paragraph 13, the scope of work. The existing language was shortened and reworded to reduce misunderstandings at the local level. In addition, in agreeing on this new language, the Union and the Company negotiators acknowledged across the bargaining table, that the companies employ and will continue to employ non-UA represented field employees who, over the years, have performed, and who will continue to perform, non-journeymen work.
>
> It is important to both the Companies and to the UA that all branches understand the intent of the revised wording of Paragraph 13. We will be contacting you through area management shortly.

By letter dated April 12, 1989, Moore responded to Tarkowski's letter of March 28, 1989 (Co. Ex. 10 - Stl.). This letter reads in full as follows:

> Dear James:
>
> I have reviewed the text of your letter sent to the managers of the companies represented by the Council informing them of the recent United

> Association-National Pneumatic Control Systems Council Agreement.
>
> We agree that the new language in Paragraph 13 was intended to reduce misunderstandings at the local level. In this regard, the elimination of the old Paragraph 13.2 which stated in part 'when incidental to or part of the repair and replacement' should go a long way in avoiding future disputes concerning the scope of the United Association work jurisdiction.
>
> Sincerely yours,
>
> (s) / M. E. Moore
> Chairman
> United Association
> Negotiating Committee

In his testimony in a preceding arbitration, Tarkowski testified that when the Council agreed to drop its proposed Paragraph 8(2), the list of tasks/duties it viewed as not work falling within the UA's jurisdiction, and, at the same time, accepting the language of Paragraph 8(1) as modified, he (Tarkowski) stated to Moore more than one time that in accepting the language of 8(1), the member companies would continue to operate as they had in the past, and that the Council was not agreeing that Paragraph 8(1) covered work done by PMI's or Tech Reps. Tarkowski testified he also stated that if the Union felt the new Paragraph 8(1) covered the work of PMI's the Union could file a grievance. According to Tarkowski, Moore did not respond to this comment, but rather he remained silent. In cross-examination, Tarkowski acknowledged that from the very outset of the 1988-89 negotiations, the Union let it be known that its primary thrust was to change the trade work jurisdiction clause, specifically Paragraph 13, but that the

Council sent the message it was not going to allow the Union to secure the PMI work under its jurisdiction and that it rejected every proposal made by the UA along these lines. Tarkowski further acknowledged that the Union made clear its intent to eliminate the "incidental to" language as a means of addressing the problems it was having from the local unions regarding the use of PMI's, and that it was the Council's view that when it agreed to the elimination of this "incidental to" language that what resulted was the Union had completely given up the right to perform the PMI type work. Tarkowski further testified that the Union was emphatic about taking out the "incidental to" language and that Moore stated the purpose of eliminating this language was to increase the scope of the UA work. Tarkowski further testified he does not recall whether he responded to Moore by telling him it was the Council's view that by eliminating the "incidental to" language, the Union was decreasing the scope of its work jurisdiction. Tarkowski explained, however, that it was the Council's view that Paragraph 8(1) as re-written which subsequently was incorporated in the 1989 Agreement as Paragraph 13(1) combined the work jurisdiction that was covered by Paragraphs 13(1) and 13(2) in the 1986 Master Agreement and that the only major change was the elimination of the "incidental to" language. Tarkowski related that the reference in the new Paragraph 13(1) to service and maintenance of mechanical equipment is all service and maintenance other than preventive maintenance. According to Tarkowski, it is akin to, in metaphorical terms, the difference between replacing brakes on an automobile and changing out the oil. Tarkowski averred that even though he did not impart to the Union the Council's view that by eliminating the "incidental to" language, it was decreasing its scope of work, he was of the view the Union knew this to be the case based on the fact of its years of experience in negotiating agreements. Tarkowski stated that, given his years of negotiating experience, he feels no obligation to point out to the other side a proposal the other side makes that is unfavorable to their position and favorable to his side's position.

The record evidence reflects that nearly three and one-half months after the Council and UA reached agreement on the 1989 Master Agreement (Jt. Ex. lP), Local 562 located in St. Louis, Missouri filed a grievance charging Johnson Controls with violating the Agreement and identifying Paragraph 13 as one of the clauses breached by its hiring of non-bargaining unit employees to perform so-called "PMI" work which the Local claimed was bargaining unit work. According to the grievance (Jt. Ex. 2 - Stl.), Johnson Controls hired three (3) employees to grease, change filters, units, belts, and perform general maintenance and calibrations including service work. The record evidence reflects the Council, Johnson Controls and Local 562 and the UA progressed this grievance to arbitration. The case was heard by Arbitrator Thomas J. Erbs on June 5, 1990 and Erbs rendered an Award October 5, 1990, denying the grievance. That Award was incorporated into this Arbitrator's Award of May 19, 1992, addressing the sole issue of arbitrability as Appendix A and by way of extension, the Erbs Award is a part of this decision on the merits. Among other findings, it was Erbs' view that the Union's position the Council had agreed to higher paid journeymen performing the disputed preventive maintenance work in question when, in bargaining, it had rejected adding the lower paid Tradesman classification was a conclusion that did not appear to be supported by either the record or by logic. Erbs stated that under previous agreements, neither journeymen nor apprentices performed preventive maintenance work unless it was performed as an incident to other specifically authorized journeymen work. Erbs found notable that whereas the Union was successful in adding the work of calibrating to its work jurisdiction by one of the changes it made to the language of the new Paragraph 13(1), it did not effect such a change with respect to preventive maintenance work. Erbs further found the Union's less than straightforward claim to its local unions as to what was gained in negotiations, specifically that it had gained jurisdiction over the preventive maintenance work, to be an indication that the Union believed the issue was ripe for arbitration. Erbs cited, however, the well-respected maxim that a party should not be allowed to secure through arbitration what it was unable to secure through negotiations. In noting that the Union carried the burden of proof, Erbs observed that that burden required him to find that the Company impliedly conceded, after specifically rejecting, a major point of its negotiating posture and on the facts before him, he could not conclude that the Council did so. Erbs held that the Union had not proven it was successful in securing for the journeymen and apprentices the work jurisdiction of preventive maintenance and that, accordingly, the Company did not violate the National Agreement, as applied to the St. Louis Branch, by assigning the disputed work to non-union personnel.

The record evidence reflects that nearly three (3) months after UA Local 562 filed its grievance that was eventually denied by Arbitrator Erbs, UA General President Boede filed a written grievance via letter dated September 26, 1989 (Jt. Grp. Ex. 2P) with the Labor Relations Committee of the Council, wherein the Union alleged Johnson Controls at its office in Peoria, Illinois had employed a non-union employee to perform bargaining unit work and, therefore, charged Johnson Controls with a violation of multiple articles and paragraphs of the 1989 Master Agreement (Jt. Ex. lP) including Article II, Paragraph 13, the Work Jurisdiction clause. In addition to the grievance which Boede requested be progressed to Step 2 of the grievance procedure, Boede submitted a report that was forwarded to him by UA Local 353 Business Manager, Larry

Dawson, which Boede stated substantiated the allegations contained in the grievance. The record evidence reflects that by letter dated September 13, 1989 (Jt. Grp. Ex. 2P), Dawson apprised Boede that officials from eight (8) locals in Central Illinois, covering a geographical area within which Johnson Controls conducts business, met with Johnson Controls Management on two (2) occasions, once on September 1, 1989 and again on September 7, 1989 for the purpose of attempting to resolve the "PMI issue".[19] Dawson related Johnson Control's position was to employ PMIs and the Union's position was it would file a grievance if the PMI was performing UA work. Dawson reminded Boede that previously he had sent his office detailed information and work sheets that Johnson had assigned UA work to a PMI. The record evidence reflects the detailed information referenced by Dawson had been forwarded by him to UA International Representative Donald F. McNamara by transmittal letter dated September 6, 1989 just one day prior to the second meeting between the eight (8) locals and Johnson Controls. The record evidence further reflects that the information was compiled by UA Member of Local 353, Robert M. Lawless, a Journeyman Fitter. This report is reproduced in full hereinbelow:

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[19] As noted in the previous decision addressing the arbitrability issue, the eight (8) Union Locals were: 25, 65, 81, 99, 137, 149, 293, and 353. The Peoria Office falls within the geographical purview of Local 353. The PMI performing the alleged UA work was working within the geographical purview of each of the eight (8) UA Locals identified above.

| Local # WHERE DONE | | |
|---|---|---|
| #353 | Item #1. | Broadmoor School, Pekin, IL<br>8-17-89 Work task originally assigned to Randy Wright (Fitter).<br>(A) Re-assigned and done by Joe Kerner (PMI)<br>4-11-89 Work task originally assigned to Russ Watts (PMI).<br>(A) Work performed by Jim Parrott and Randy Wright (Fitters). |
| #25 | Item #2. | Information only! Sears, Quincy, IL<br>5-3-89 Work done by Bob Lawless, Local 353 Fitter. |
| #99 | Item #3. | Post Office, Bloomington, IL<br>Work originally assigned to and done by Mark Blanchard (Fitter #99).<br>(A) Work re-assigned and done by Joe Kerner (PMI) on 8-15-89. |
| #353 | Item #4. | Boy Scouts, Peoria, IL<br>Work originally assigned to and done by Jim Parrott (Fitter #353).<br>(A) 8-3-89 work re-assigned and done by Joe Kerner (PMI). |
| #353 | Item #5. | Dupont Chemical, El Paso, IL |

This temporary repair work done as a result of a fire, 4-6-89.
Work done by Joe Shallbetter and Russ Watts of JCI.
Fitter was dispatched on following day to make permanent repairs.
No fitter was originally dispatched to make temporary repairs.

#149 Item #6. Farm Credit Services, Champaign, IL
Work originally assigned to and done by Larry Swope (Fitter #149).

(A) 8-10-89 work re-assigned to and done by Joe Kerner (PMI).

Item #7. Eye Witness Report
Eye witness report of a violation of Jurisdiction job - Dupont Chemical

Date: 8-3-89
Time: Approximately 3:55 p.m.
Location of Violation: Johnson's Shop, 9006 Industrial Road, Peoria, IL

On August 3rd, approximately 3:55 p.m., Randy Wright and Jim Parrott (Fitters) returned to shop (9006 Industrial Road) to pick up material for the following work day. Upon entering shop area, they found Joe Kerner (PMI) laying inside of an evaporator section of an air handling unit with his tools scattered about him. Upon approaching him (Joe Kerner) he was just snapping a drive belt back onto the unit fan and motor assembly. Upon further inspection it was found that the motor had been replaced with one of a closed housing style. This was a new unit.

On August 7th, at approximately 8:35 a.m., Jerry Bastian (JCI) was asked by Bob Lawless (Fitter JCI) in the presence of Tom Meyer (Fitter), Randy Wright (Fitter), part time parts procurer, Jim Parrott (Fitter), and Russ Watts (JCI part time PMI) if that was a different motor on that air handler. Jerry Bastian replied that it was necessary because the air handler was not equipped with an explosion proof motor and that where it was going required that it have one.

Jerry Bastian also acknowledged that it probably wasn't the smartest thing to have Joe Kerner (PMI) change out the motor.

This unit was shipped out on a trailer pulled by Jim Parrott (Fitter #353) on 8-7-89, to the job site in El Paso.

| | |
|---|---|
| Unit was installed by: | Larry Mooney (Fitter #353) who worked for mechanical contractor, General Power and John Venson (Tinner #1) of Dumont Sheet Metal. |

Robert M. Lawless
Local #353
Card #325-40-4316

(Jt. Grp. Ex. 2P)

At this arbitration hearing, Lawless testified he first learned of Johnson Controls' interest in filling a PMI position at its Peoria Branch office sometime in June of 1988. According to Lawless, on date of July 24, 1988, Johnson hired non-union employee Joe Kerner for the PMI position.[20] Lawless recalled that prior to hiring Kerner, Johnson interviewed another prospective candidate for the position and on this date, July 14, 1988, he confronted Joseph Shallbetter, the Operations Manager of the Peoria Branch office, apprising him that Local 353 was about to take in nine (9) apprentices and that Johnson could certainly utilize them to perform some of the preventive maintenance work. According to Lawless, Shallbetter responded with the comment, "[W]e're going to go nose to nose on this" to which he replied, "[W]e certainly will." Lawless testified that, in the past, Johnson had used apprentices to perform the duties of preventive maintenance citing, as examples, himself and employee Jim Parrott when he and Parrott were initially hired as apprentices. According to the record evidence, the duties the PMI was to perform were as follows:

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[20] It is noted by the Arbitrator that Kerner's hiring preceded the effective date of the 1989 Master Agreement (Jt. Ex. 1P).

(continued...)

1) visual inspection of the equipment
2) oil and greasing
3) belt adjustments
4) changing of filters
5) troubleshooting to determine if there is anything wrong
6) ordering parts to make any necessary repairs or replacements.[21]

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[20](...continued)
As an interesting aside, the Arbitrator notes this was in and around the same time period Local 562 in St. Louis lodged a complaint concerning the hiring of a PMI (see p. 20 of this Award, Supra).

[21] It is noted that the Parties at the hearing stipulated to this list of duties with the understanding that in performing the (continued...)

Lawless testified he reported to Dawson that Johnson had hired a PMI and that Dawson directed him to keep an eye on the PMI to see what he was doing. Lawless explained that since the nature of the job does not permit one to accompany a fellow employee on service calls, the way in which he accomplished Dawson's directive was through monitoring his own accounts, in other words, the accounts assigned to him to determine whether the PMI was doing any of the work that he was doing and, in addition, gathering the same kind of observational data about the PMI from fellow steamfitters. Lawless explained this was the methodology used in compiling the information reproduced hereinabove which he submitted to Dawson and which Dawson in turn submitted to UA International Representative, McNamara (see pp. 40 and 41 above).

Lawless asserted that with the possible exception of two particular duties performed by Kerner and listed among the documents submitted into evidence, such as, for example, resetting the main, all the duties performed by Kerner and listed in the information that he submitted to Dawson was UA work per the provisions of the 1989 Master Agreement (Jt. Ex. lP). Lawless acknowledged that between the years 1983 and 1989, Johnson Controls occasionally hired PMI type employees but that in August of 1989 it, for the first time, aggressively pursued using a PMI offering Kerner as the example. Lawless explained that what he meant by aggressively pursuing the use of a PMI is what was reflected by the information he compiled which showed that UA Fitters were pulled off contracts and

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[21](...continued)
duties of troubleshooting and ordering parts, the PMI does not put tools to the equipment and tear it down to determine if there is something wrong.

the scheduled maintenance work reassigned to Kerner. Lawless maintained that prior to August of 1989 or perhaps prior to July of 1988 when Johnson hired Russ Watts to perform PMI duties on a part-time basis, assignment of scheduled maintenance work was only sporadically made to non-union personnel. Lawless asserted that up until the time Johnson hired Kerner, UA Mechanics were regularly assigned routes in which they performed scheduled maintenance which was not associated with an equipment breakdown or the work of a repair and replacement. Lawless maintained that scheduled maintenance work was exclusively UA work up until 1989 with the few exceptions that occurred in the 1983-1989 period. According to Lawless, under the 1989 Master Agreement (Jt. Ex. lP), scheduled maintenance work was recognized as UA work and that Johnson was in violation of the Agreement when it hired Kerner as a PMI and reassigned the scheduled maintenance work to him.

Larry Swope, a Business Agent for UA Local 149, one of the eight (8) locals involved in the instant grievance, testified he had been employed by Johnson Controls as a Service Mechanic for nearly five years between the years 1984 and 1989. According to Swope, in the time he worked for Johnson Controls, he performed both service work and preventive maintenance work which he estimated was evenly split 50-50 on a percentage basis. Swope explained that on a periodic basis, either monthly or quarterly, he would visit an account and perform scheduled maintenance work which involved such duties as: (1) check calibration, (2) oiling and changing oil, (3) greasing bearings, (4) changing belts, and (5) replacing filters. Swope testified he considers preventive maintenance to be skilled work explaining that in performing the various duties except for filter changing, one is constantly evaluating the HVAC system and ascertaining what, if any, improvements can be made to the system based on the customer's needs.[22] Swope identified the other UA Mechanics that worked in the Central Illinois area, naming seven (7) to eight (8) employees and testified that notwithstanding the fact their routes were different than his, the whole of the work they performed was no different than the whole of the work he performed.

Swope further testified that prior to Johnson Controls having Watts and Kerner, there was only one instance he could recall that the Company used a non-bargaining unit employee to perform PMI work in his geographic area and that was a man named Ron Sneeden. According to Swope, the then incumbent Business Manager of Local 149 asked Sneeden to leave. Swope testified that in his capacity as a Business Agent of Local 149, he had, on more than one occasion, investigated the type of work Kerner was performing. Swope testified that he discovered Kerner had been assigned a service call to determine why a boiler was not operating. According to Swope, he discussed this assignment with Shallbetter, advising him that the work in question was UA work and that giving the work to Kerner was a breach of the National Agreement. Swope testified that Shallbetter acknowledged he was right and apologized, explaining that under the circumstances which were that Kerner was in the area at the time, he (Shallbetter) had to assign Kerner the work.

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[22] In partial testimony, Operations Manager Joseph Shallbetter stated just the opposite, that is, that in his view the PMI duties referenced by Swope do not constitute skilled work. The Arbitrator notes that earlier testimony proffered by Moore concerning the lower rated Job Classification of Tradesman in the Mechanical Equipment industry supports the view that preventive maintenance for the most part is not skilled work.

According to testimony by Rick Terven, Business Manager of Local 99, subsequent to Dawson forwarding the information to the UA concerning instances in which the Company had violated the National Agreement (Jt. Ex. lP), by assigning UA work to Kerner, a non-bargaining unit employee, he received a telephone call from Mark Blanchard, a member of Local 99, who reported that a "gentleman" was performing UA work at the State Farm Corporate building located in Bloomington, Illinois, and that he should come over to the building for a first-hand look. Terven testified he responded to Blanchard's call by going to State Farm and there encountered Joe Kerner wearing a tool belt, standing on a ladder and engaged in the work of calibrating an aqua-stat on a steam unit heater. Terven related he asked Kerner if he knew that the work he was performing was UA work, that is, the work of pipefitters, to which he responded in the affirmative, stating Management had asked him to do the work and that he just wished this situation (meaning the work jurisdiction issue) would be resolved. Terven testified he read Paragraph 13 to Kerner and after Kerner acknowledged his belief that the work he was performing was UA work, he informed Kerner he was going to call Kerner's boss, Jerry Bastian, and advised Kerner he really did not want him to do UA work. Terven testified he called Bastian and reported the incident, that Bastian responded he would look into the matter and would get back to him but that Bastian never did get back to him. Local 353 Business Manager Larry Dawson testified he received a telephone call from Blanchard who apprised him he had observed Kerner performing UA work at State Farm and that he advised Blanchard to call his Business Manager Rick Terven. Subsequent to Blanchard's call, the record evidence reflects that Blanchard reduced his observation to writing in a letter dated October 10, 1989, which he sent to Dawson (Un. Ex. 7-P). Dawson related, after receiving the letter, he called Jerry Bastian and he informed Bastian he had hard proof that Kerner performed UA work. According to Dawson, Bastian told him he would look into the allegation but that Bastian never got back to him.

Joseph Shallbetter, the Operations Manager in the Peoria Branch of the Systems and Service Division of Johnson Controls, testified that the business of the Division is to sell, install, service and maintain automatic temperature controls, fire alarms, and security systems for industrial and commercial buildings. Shallbetter related that in 1989 the Peoria Branch had in its employ two (2) PMIs, Russ Watts and Joe Kerner. Shallbetter noted that Watts commenced employment in late 1988 and Kerner commenced his employment sometime in August, 1989. According to Shallbetter, the duties to be performed by the PMIs were as follows:

1. Check on air handling unit, heating and cooling equipment for proper operation
2. Check filters on a programmed basis and replace if necessary
3. Inspect, grease and lube fans and motors on a periodic basis
4. Check the temperature control and air compressor for run times and record that date on the scheduled maintenance visit report
5. Clean condenser and evaporator coils on air handling units on a programmed basis
6. Adjustment and/or replacement of belts on a scheduled basis

7. Changing oil in the air compressor on a programmed basis

8. Cleaning the general area

Shallbetter stated that none of the aforelisted duties require a skilled employee to perform them. In testifying about specific work Kerner performed which the Union claimed was UA work, Shallbetter stated the following:

A) Worked Performed at Farm Credit - 4/9/90 (Un. Ex. 6 - P) Shallbetter testified that Kerner pushed a reset button on a boiler and, using a screwdriver, adjusted the operating limit downward from 210 degrees to 160 degrees. Kerner also checked the pump operation, the operation of the boiler and the controls and noted they were working properly. Shallbetter acknowledged in later testimony that this assignment given to Kerner could be viewed as a service call and that this was not work of a PMI.

B) Worked performed at State Farm - 10/89 (Un. Ex. 7 - P) Shallbetter testified that Kerner dialed the pneumatic thermostat up and down to check to see if the fan was working.

Shallbetter, in his testimony, confirmed he attended the September, 1989 meetings with the eight (8) local unions and that under discussion was the PMI work and that there was no final resolution of the issue and essentially the parties agreed they were in disagreement about the terms of the 1989 Agreement (Jt. Ex. lP) as it related to PMI work. Shallbetter testified that in his review of the work orders of work assigned to and performed by Kerner that formed the basis of the seven (7) items complained of by the local unions that is now the subject of this arbitration, he was unable to discern any work Kerner performed that fell outside of the preventive maintenance tasks he identified hereinabove. Shallbetter testified that preventive maintenance work except for that falling within the parameters of the "incidental to" language has never been the exclusive work of the bargaining unit but, even so, there are occasions when he will assign non-incidental scheduled preventive maintenance work to bargaining unit employees such as when PMIs are overloaded with work or by reason of convenience if the Fitter happens to be in the specific geographic area of the account. Shallbetter testified that prior to hiring Russ Watts in July of 1988, the Peoria office had very little scheduled maintenance contract work but that the limited amount of such work was performed by UA mechanics.

As the Parties were unable to reach a mutually satisfactory resolution of the instant dispute through the Contractual grievance procedure, the matter now comes before this Arbitrator for a final and binding determination.

## CONTENTIONS

### UNION'S POSITION

It is the position of the Union as set forth in its extensive post-hearing brief, that the work identified to constitute preventive maintenance is work belonging to the jurisdiction of the Union pursuant to Article II, Paragraph 13(1) of the 1989 Master Agreement (Jt. Ex. lP). In pertinent part, the Union's post-hearing brief is incorporated as part of this Opinion and Award and appended hereto as Appendix A.

## EMPLOYER'S POSITION

It is the position of the Company and Council as set forth in its extensive post-hearing brief that the disputed work in question is not covered by the 1989 Master Agreement and therefore the performance of this work by non-union PMIs does not constitute a violation of Article II, Paragraph 13(1) of the Agreement (Jt. Ex. lP). In pertinent part, the Employer's post-hearing brief is incorporated as part of this Opinion and Award and appended hereto as Appendix B.

## OPINION

Collective bargaining is a process by which each party to the bargain attempts to secure that which will satisfy its wants and needs and, in the alternative, if it lacks the power to obtain such rights and benefits, it will attempt to minimize any arrangements that will be to its detriment. Collective bargaining is a dynamic process so that over time, factors and conditions once perceived as important and influential considerations in the advancement of a party's best interests, ebb and flow, and other factors and conditions take their place. The same holds true in terms of the balance of power between the bargaining parties; that is, to say, that in some negotiations, the employer will have the "upper hand", while at other times, it will be the union. There also exists the situation where each party is equally powerful, which makes for interesting and tough negotiations and, in viewing the bargaining history between the Parties at bar here, this seems to have been the hallmark throughout the years of their relationship.

In an overall general sense, the driving force for employers in bargaining is the economic considerations of marketplace competition and the goal to maximize profits, whereas for the unions it is the economic well-being of their constituent members as measured by wages, hours and the state of working conditions. While parties may perceive their respective needs and wants as being conflicting, that is, what is beneficial to the employer may not also be beneficial to the union, and vice-versa, there is generally an understanding by the parties that a certain underlying compatibility of interests exists between them that will insure an outcome that is not lopsided in terms of the benefits gained or the concessions made. In the simplest of terms, collective bargaining is a process of give and take where the most beneficial outcome is one in which neither party "loses" and neither party "wins", but one in which both parties walk away from the negotiation believing that each side, to the best of their ability, came as close as they could to satisfying their respective objectives at the bargaining table. Such satisfaction, however, does not mean victory on all fronts at the expense of total capitulation by the other side. What it does mean is that each party made the necessary compromises in order to strike the best bargain they could given all the prevailing pressures attendant on them to reach agreement under all the prevailing circumstances.

An amusing story about the give and take nature of collective bargaining, was told to this Arbitrator early on in his career in labor relations by the illustrious neutral, David Cole, when he served as Chairman of the National Commission for Industrial Peace, and this Arbitrator served as the Presidential Commission's Executive Director. During the 1940's, when Cyrus Ching was serving as the first Director of the Federal Mediation and Conciliation Service, he became involved in settling a very contentious strike in the coal industry. The coal association's principal spokesperson was George Humphreys, who later was to serve as U.S. Secretary of the Treasury, and on labor's side, the principal spokesperson was the powerful President of the United Mine Workers, John L. Lewis. Humphreys and Lewis were described as not very friendly to each other and very adversarial in their bargaining relationship, so much so that the two men resisted ordinary attempts to reconvene negotiations. Cyrus Ching, under political pressure to get the nationwide strike settled, called a secret meeting between himself, Humphreys and Lewis to be held in an obscure hotel located in White Sulphur Springs, West Virginia, outside of Washington, D.C., where all three resided. Wishing to avoid media attention and coverage of the meeting, each traveled to West Virginia separately and incognito. At the appointed time, the three met in Ching's hotel room. Ching opened the meeting by thanking Humphreys and Lewis for consenting to meet and then launched into a spiel about the importance of settling the strike for the good of the nation, concluding with the observation that collective bargaining was a process of give and take, and then turning to Lewis, he asked what his thoughts were, hoping that Lewis had picked up on the idea of at least thinking about making some concessions. Lewis looked at Ching and without any hesitation said, "I'll take anything this SOB Humphreys wants to give me", to which Humphreys replied, "I'll be damned if I'll give him anything." This meeting, having lasted for only several minutes, ended on this note, and a settlement of the dispute was deferred until a later date.

The point of this story relative to the case at bar is an illustration of the dictum, "the past is prologue", meaning that one necessarily has to be versed in what preceded an event or outcome in order to comprehend the meaning of the event or outcome. Even though the Union maintains the instant grievance can be decided without the necessity of having to delve into a twenty (20) year history of collective bargaining because, in its view, the language of Paragraph 13 in the 1989 Master Agreement (Jt. Ex. 1P) is clear and unambiguous, the Arbitrator respectfully disagrees with this position on grounds that the present language of Paragraph 13, no matter how clear and unambiguous it appears to be on the surface, is definitely a product of the give and take nature of bargaining that has occurred in response to the changes and developments that have occurred in the industry since the Parties commenced their formal bargaining relationship in 1969. Furthermore, as revealed by a review of the bargaining history, the issue of the Union's work jurisdiction has been a matter of vital interest to both sides in every one of its six (6) rounds of negotiations as evidenced by the remarkable revisions made to the clause since the first Master Agreement (Jt. Ex. 8 - Stl.) was consummated.

A review of the bargaining history reflects that between 1969 and 1974, a period within which the Parties here negotiated two Master Agreements, 1969 and 1972, the Parties left unchanged the language of Paragraph 13, the work jurisdiction clause, notwithstanding the fact that the five (5) principal companies comprising the Council, along with other companies signatory to the Master Agreements that were national in scope were moving apace to diversify their business into service and maintenance work of mechanical equipment. Although there was the briefest of reference to the existence of "technicians" that apparently were non-union employees used by some of the companies comprising the Council, more specifically, Honeywell and Johnson Controls, there is no evidence before this Arbitrator regarding the tasks/duties performed by these "technicians", nor the number of technicians that were actually employed. In any event, it cannot be determined from the state of this record whether the tasks/duties known by the Parties to constitute preventive maintenance to mechanical equipment was performed solely by technicians or whether such work which appears not to have been too extensive at this time was performed by technicians at some locations, by journeymen and apprentices at other locations, or by both technicians and journeymen and apprentices at still other locations.

In 1974, the record evidence reflects that a revision was made to Paragraph 13 by the addition of the phrase "or other piping" systems inserted three (3) times within the work jurisdiction clause. The Union asserts that this added language reflected jurisdiction over the service and maintenance. to mechanical equipment work that the pneumatic companies were continuing to acquire through fixed price, scheduled maintenance contracts, on a bid basis which previously had been work performed primarily by companies in the mechanical equipment industry. In the latter industry, which is also organized by the Union, such service and maintenance work is reserved to bargaining-unit employees, but to a lower rated classification of employees known as Tradesman. In any event, the Union makes the case, based on the existence of the Tradesman classification, that the work of preventive maintenance is work that belongs to the Union, and that while there was no such Tradesman classification in the Pneumatic Controls industry, the work of preventive maintenance was still work that fell within its jurisdiction as a result of the added language, even though it was performed by the higher rated paid journeymen and apprentices. The only testimony presented by the Employer in refutation of the Union's position was that proffered by Larry Smith, a former employee of Honeywell who was a member of the Council's Labor Relations Committee in the years 1969 to 1979, and who asserted that the added language of "or other piping" systems referred to sprinkler systems which some of the contractors serviced and maintained. While there is really no way in which to resolve this conflict in testimony since both witnesses appear to have rendered credible testimony, the Arbitrator is persuaded that since the language of "or other piping" systems is general in scope as compared to the more specific, sprinkler systems, the Parties must have had in mind a much broader coverage of work. It is therefore highly plausible that "or other piping" systems contemplated the inclusion of service and maintenance work to mechanical equipment. As support for this finding, the Arbitrator notes that in the complete revision of Paragraph 13(1) that resulted in the 1989 Master Agreement (Jt. Ex. IP), the reference to "or other piping" systems was deleted and specific references to mechanical equipment were added.

In his decision in the St. Louis case, Arbitrator Erbs appears not to have considered the significance of the 1974 work jurisdiction clause and seemingly confined his review of the historical evolution of preventive maintenance work back to the 1976 Agreement only. This is evident by the following findings made by Erbs wherein he averred that "historically, the parties have viewed preventive maintenance work as different from other service, maintenance and repair work on various equipment." Erbs went on to identify preventive maintenance tasks as including "oiling, greasing, various belt adjustments, cleaning and other jobs associated with routine maintenance outside of repair or replacement." Erbs then held that such preventive maintenance work, in fact, had been "carved out of the agreement as a separate item which belonged to the Council unless performed in conjunction with a repair." Clearly, the record evidence detailing the history of negotiations demonstrates that the development to which Erbs makes reference did not occur until 1976, and that Erbs failed to consider the state of affairs prior to 1976 but more specifically, to the jurisdiction of work that existed between 1974 and 1976 which occasioned the carving out of a portion of maintenance work from the whole of maintenance work. While there is support for Erbs' observation that preventive maintenance work was viewed as different from other maintenance work attendant to repair work on various equipment, as evidenced by the results of bargaining between the UA and the contractors party to the 1974 Mechanical Equipment Service and Maintenance, Agreement wherein it was agreed to establish a "Tradesman" job classification to perform such preventive type maintenance work, and where such attempt was made by the UA to establish such a Tradesman category with contractors in the pneumatic controls industry but failed, nevertheless, the critical point here is not the distinction between maintenance work and preventive maintenance work, but rather that the UA considered both types of maintenance work as falling within their work jurisdiction. Nowhere in this record evidence has the Council demonstrated by any conclusive proof that between 1974 and 1976 the tasks/duties identified as constituting preventive maintenance work were not the exclusive work of the Union. In fact, given the circumstances extant in 1976, the only plausible explanation for revising the work jurisdiction clause with the insertion of the "incidental to" language was the recognition by the Council that preventive maintenance work was work within the exclusive jurisdiction of the Union. As was noted above, the driving force for employers in bargaining a labor contract are considerations of marketplace competition and the ability to maximize profits. The situation that the Council contractors found themselves in, in 1976, was that they were disadvantaged with respect to marketplace competition with mechanical equipment contractors for bidding fixed price scheduled maintenance contracts and successfully obtaining this work because the mechanical equipment contractors were able to utilize the services of the lower paid Tradesmen classification to perform the work, whereas the Council contractors had to utilize the higher paid journeymen and apprentice plumbers to perform the work. Given this difference, the mechanical equipment contractors were in a position to submit lower bids for the routine preventive maintenance service contracts. Compelled by economic considerations, but at the same time, not desiring to enlarge the bargaining unit, the Council contractors sought a way to become competitive for the periodic routine preventive maintenance work in question and was able to achieve this goal by securing from the Union the concession of a substantial part of this work through the revision made to the work jurisdiction clause by the insertion of the "incidental to" language. Looking at these competitive conditions facing the Pneumatic contractors in 1976, the Arbitrator is persuaded that the Council's position they expanded the work jurisdiction of the Union by granting the higher paid journeymen and apprentices some of the preventive maintenance work by way of adding the "incidental to" language is simply nonsensical, for to do so would be to increase their labor costs for the performance of this type of work, rather than to reduce their labor cost to the lowest level possible. Stated more simply, if it was truly the case that preventive maintenance work was not work exclusively within the UA's jurisdiction, then why not hire the lower paid non-union PMIs and give them all the preventive maintenance work, thereby reducing the labor costs for the performance of this work to its lowest level for the purpose of becoming even more competitive?

The Union's motivation to cede in part the preventive maintenance work is seen by the Arbitrator to be consistent with its longer run bargaining objectives for insuring the well-being of its constituent members in that its members would benefit from an overall expansion of work attendant to the contractors expanding their business. However, the Union obviously did not anticipate the scope of the tasks/duties PMIs would be assigned by Johnson Controls to perform, the extent of which the Union concluded encroached upon their work jurisdiction which involved work outside the parameters of preventive maintenance work as defined by the 1976 work jurisdiction clause to be confined to belt adjustment, oiling, greasing and cleaning of equipment. In other words, the work the Union believed it had ceded was belt adjustment, oiling, greasing and cleaning of equipment when this work was not "incidental to" the work of repair and replacement of equipment. Additionally, since PMIs were being compensated at a lower rate than the rate paid to a Tradesman by mechanical equipment contractors and, at the same time being utilized to perform a number of varied tasks, the Council contractors, but, more specifically, Johnson Controls, was in a very strategic position to bid fixed priced, scheduled service and maintenance contracts, resulting in its successfully outbidding the mechanical equipment contractors. Absent any evidence proffered by the Council to the contrary, the Arbitrator credits the testimony by Moore that the Union was pressured by the mechanical equipment contractors to take action to insure a more competitive environment and from its local unions to take action regarding their complaints that PMIs were performing bargaining-unit work. According to its own testimony, the Union was unsuccessful in remedying either problem by the revisions made to the work jurisdiction clause in the 1986 Agreement so it focused on both these problems tenaciously in the negotiations for the 1989 Master Agreement.

There is no question in the Arbitrator's mind from the close, comprehensive, and in-depth review of the bargaining that occurred between the Council and the Union for the 1989 Master Agreement that the Union pursued in a single-minded and relentless way, a revision to its work jurisdiction that would recapture the preventive maintenance work it ceded away in 1976 through the "incidental to" language and that it did so to quell the complaints from both the mechanical equipment contractors and its various local unions that were ever mounting since the failure of the 1986 Agreement to remedy the problems. There is also no question in this Arbitrator's mind that the Council was just as dedicated in negotiations at least up to the last and final bargaining session on March 22, 1989, to resisting the Union's initiative to alter their work jurisdiction in the way the Union sought to do so in order to include the work of preventive maintenance. Arbitrator Erbs, in his decision, professes a sense of disbelief that the Council could have ultimately accepted a Union proposal that would have accomplished what they were seeking, that is, jurisdiction over the preventive maintenance work in question when the Council had previously rejected two other proposals by the Union that would have achieved this same objective. Such disbelief, however, discounts or completely ignores the true dynamics of the collective bargaining process which is, that it is oftentimes an emotional, not rational process, and that it is extremely responsive to pressures. The instant negotiation was not exempt from these realities of the bargaining process. The two previous proposals that were made by the Union and rejected by the Council were bargaining transactions that occurred absent any applied pressure by the Union. The proposal that was finally agreed upon was the proposal that was advanced by the Union under pressure by the Union to implement a "developed" contract, one that had unilaterally been written by the Union. It is obvious that the Council sought to avoid the implementation of such a "developed" contract since such an outcome would serve to undermine its standing as the bargaining representative for the contractors in the industry, especially if a significant number of contractors opted to sign the "developed" contract. In an attempt to prevent this occurrence, the Council elected to make a counterproposal on the issue, something that it had not done before in the previous nine (9) bargaining sessions. Such a move by the Council indicates to the Arbitrator the Council was reacting to the pressure being applied by the Union. A review of the Council's counterproposal shows that the Council was prepared to accept with only slight modification the Union's "developed" Paragraph 8(1) language if it were tied to acceptance by the Union of its proposed Paragraph 8(2) language. In fact, a review of the two sections of the proposed

Paragraph 8 clearly establishes the connection between them with the very first phrase in section 1 reading "Subject to subparagraph (2) below ..." and under item (d) in section 2 referencing preventive maintenance work the parenthetical phrase, "not as incidental to the work performed pursuant to subparagraph 1." In finally agreeing to drop all of its proposed section 2 and the aforecited phrase in section 1, the Council dissociated the dependency of the two sections leaving as the outcome the acceptance of the Union's "developed" Paragraph 8(1).

Testimony proffered by Council witness Tarkowski establishes that the Council viewed the language of Paragraph 8(1) as an amalgamation of what had been contained in Paragraph 13(1) and 13(2) in the 1986 Agreement. With this acknowledgment, coupled with the elimination completely of the "incidental to" language from the work jurisdiction clause, the Arbitrator is convinced that the Union did, in fact, recapture the preventive maintenance work that had been theirs prior to 1976. Here again, the past is prologue dictum is instructive. Prior to 1976, there was no distinction made between maintenance work attendant to repair of equipment and replacement of parts and, preventive maintenance, even though, as Erbs put it, there was a recognition historically that preventive maintenance was different from other maintenance work. It was not until the 1976 Agreement that the Council and the Union bifurcated the work of maintenance, accomplishing this by the addition of the "incidental to" language which formally separated preventive maintenance from maintenance attendant to repair of equipment and replacement of parts. When in 1989 the Council and the Union agreed to eliminate the "incidental to" language, it effectively agreed at the same time to eliminate the formal distinction between preventive maintenance work and other maintenance work. In reading the clause as it presently exists in the 1989 Agreement (Jt. Ex. lP), there is absolutely no doubt that absent any reference to preventive maintenance work or an enumerated list of tasks/duties constituting preventive maintenance work, that the term maintenance must be construed as applying to all tasks/duties associated with maintenance work regardless of the range of complexity or simplicity of those tasks/duties. Furthermore, there is also no doubt that the way in which the language is structured, such maintenance work applies not only to pneumatic controls systems, but also to mechanical equipment.

Having so found that preventive maintenance work is exclusively the work of the Union's under the provisions of Paragraph 13(1) of the 1989 Agreement, the final question that remains to be addressed is whether the work performed by PMI employee Kerner violates Paragraph 13(1) of the 1989 Agreement (Jt. Ex. lP). The Arbitrator finds that to the extent Kerner performed any kind of maintenance work on all plumbing and/or pipe fitting systems, including pneumatic controls and mechanical equipment, the Agreement was violated, but that any other work performed by Kerner was not a violation.

Finally, Erbs in arriving at an opposite finding in his decision than the one reached here by this Arbitrator with regard to the subject "Peoria" grievance, cited the "well respected maxim" that a party should be barred from securing through arbitration what it was unable to secure through negotiations. This Arbitrator wholeheartedly concurs but in the case at bar, there was a recognition by the Council and the Union that a resolution of the issue had not necessarily been resolved, that it had been fudged for whatever their respective reasons and that there was almost an understanding that the matter would have to be disposed of in arbitration as evidenced by the remark made by Tarkowski to Moore at the last bargaining session that if the Union felt the new paragraph 8(1) covered the work of PMIs, the Union could file a grievance. Based on this remark and the uncertainty as to the meaning of what had been agreed to, the Arbitrator is of the view that the instant case, like the St. Louis case before Erbs, represents an exception to the "maxim" cited by Erbs.

In taking into account, and being cognizant of his scope of authority as did Arbitrator Erbs, in his case, this Arbitrator states that the findings here pertain only to the "Peoria" grievance, fully recognizing that grievances pertaining to the identical issue are pending in other geographical areas serviced by Johnson Controls. As to the remedy requested by the Union regarding pay and benefits to be made to PMIs, the Arbitrator rejects this request as the Union has no jurisdiction over employees not in the bargaining unit.

## AWARD

Based on the rationale set forth in the preceding Opinion Section, the Arbitrator finds that the work in dispute, specifically work that has been identified as constituting preventive maintenance work, is covered by Article II, Paragraph 13(1) of the 1989 Master Agreement (Jt. Ex. 1P). Accordingly, the Arbitrator rules to sustain the grievance and directs the Employer to implement the following remedy:

1. That all affected UA members of the eight (8) Central Illinois locals who, as a result of covered work assigned to non-union PMIs, were denied work opportunities and thereby deprived of earnings and fringe benefit contributions be made whole for all lost wages and fringe benefits.

2. Such make whole payments shall be made as soon as practicably possible but no later than sixty (60) calendar days after the receipt date of this Award.

The Arbitrator grants the Union's request for him to retain jurisdiction for the purpose of resolving any disputes that might arise concerning compliance with this Award until such time as it is fully implemented.

GRIEVANCE SUSTAINED.

GEORGE EDWARD LARNEY
Arbitrator

February 3, 1993

## 29 U.S.C. § 151

### § 151. Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.